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# TRANSCRIPT OF RECORD

Supreme Court of the United States
OCTOBER TERM 1926

No. 577

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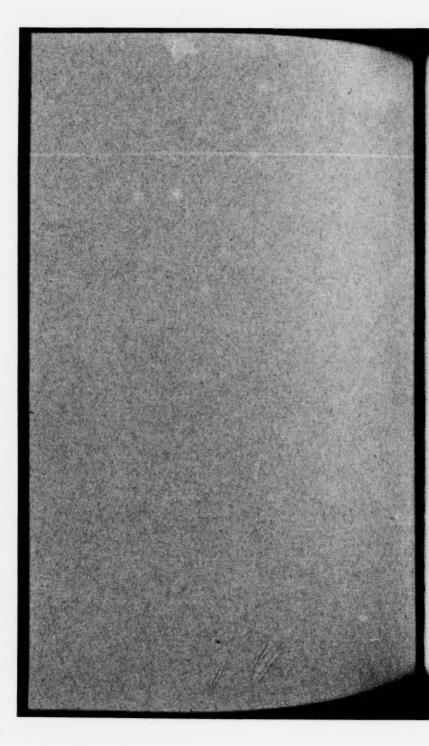
E. B. SPILLER ET AL.

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OCTOBER TERM, 1926.

#### No. 577

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vs.

#### E. B. SPILLER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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#### [fol. a] [Caption omitted]

[fol. 1] Citation, in usual form, showing service on E. T. Miller et al., filed February 17, 1923, omitted in printing.

[fol. 2] [Caption omitted]

# IN UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI

BILL OF COMPLAINT—Filed May 27, 1913

NORTH AMERICAN COMPANY, Plaintiff,

1'8.

St. Louis & San Francisco Raileoad Company, Defendant

The North American Company brings this bill of complaint against the St. Louis & San Francisco Railroad Company, hereinafter called Railroad, and avers:

#### First

That complainant is a corporation duly and legally organized under, by virtue of and pursuant to the laws of the State of New Jersey, and is a citizen and resident of said State of New Jersey, within the meaning of the laws defining the jurisdiction of this court.

#### Second

That the St. Louis & San Fancisco Railroad Company is a consolidated railroad corporation, organized and existing under, by virtue of and pursuant to the laws of the States of Missouri and Kansas; and that a substantial part of the railroads operated and owned by it, to-wit, 1,717 miles are located in the State of Missouri, and its chief operating and general offices are located at the City of St. Louis, in said

State, and within the judicial district of this court, and said Railroad Company is a citizen and resident of the State of Missouri, within the meaning of the laws fixing and defining the jurisdiction of this court.

[fol. 3] Third

That defendant Railroad Company owns and operates an aggregate of over 5,254 miles of railroad in the States of Alabama, Arkansis, Kansas, Missouri, Mississippi, Oklahoma and Tennessee, all continuous and conecting, and forming a complete railroad system, and contain rolling stock equipment and other property, both real and personal rights, privileges and franchises appertaining to or used in connection with its line of railroad and business, and is also the owner of certain bonds and stocks of various other corporations.

#### Fourth

Your orator further alleges, on information and belief, that the lines of railroad and equipment owned and operated by the defendant, are subject to certain mortgages and other liens, which mortgages and liens secure indebtedness as stated in Exhibit "A," hereto attached and made a part hereof, and to which reference is hereby made.

Your orator further avers, upon information and belief. that defendant on or about October 1, 1902, made a certain agreement with the Colonial Trust Company of New York, as Trustee, (which Trust Company has been succeeded by consolidation, merger or otherwise, by the Equitable Trust Company of New York), whereby it agreed on the 1st day of July, 1912, to purchase and pay any shareholder who should deposit with said Trust Company either the preferred or common stock of the Chicago & Eastern Illinois Railroad Company the following prices per share, to-wit: For Preferred \$150,00, Common \$250,00, and in the meantime to pay as dividends upon respective classes of stock, as follows: upon the preferred \$1.50 per share for each quarter beginning January 1, 1903, and \$5.00 semi-annually upon each share of the common beginning January 1, 1903. That under said agreement 180,445 shares of the common stock and 125,835 shares of the preferred stock of

the Chicago & Eastern Illinois Railroad Company were deposited with the said Trust Company, and that from thence until now the defendant has paid respectively the quarterly and semi-annual dividends as aforesaid upon said shares of stock; that there will be due under the said obligation on the first day of July, on account of the common shares so deposited, the sum of approximately between six and seven hundred thousand dollars.

Your orator, upon information and belief, charges that the defendant receives no income from the stock so deposited with which to pay the quarterly and semi-annual

[fol. 4] dividends as provided by said contract.

Your orator further avers that the principal business of the said Chicago & Eastern Illinois Railroad Company (a consolidated railroad corporation, organized under the laws of the States of Illinois and Indiana, owning and operating a system of railroads therein) is the transportation of coal from mines situated along or in close proximity to its railroad and the products of such mines constitute more than one-half of the total tonnage of trade transported by said That in April, 1912, by the concerted action of the miners employed in said mines all of said mines wholly suspended operation, and such suspension lasted more than sixty days, and thereafter the operation of said mines was slowly recommenced, whereby the coal traffic usually carried by the defendant was almost wholly suspended during the months of April and May, 1912, and was very largely reduced during the three next succeeding months, and that during the suspension of the operation of the coal mines, as aforesaid, along the lines of the said railroad, as aforesaid, the coal cars of the said railroad became widely scattered among other railroads, so that when the normal shipments of coal from the said mines were available, the said railroad company was unable to furnish coal cars for the transportation thereof; that during the months of March and April of 1903, disastrous floods occurred along the lines of the said railroad, whereby the continuity of its main lines were destroyed and the movement of through trains was wholly interfered with and suspended for nearly one month. That by reason of the aforesaid conditions, the defendant has been unable to obtain any dividends upon the stock so deposited with the said Trust Company, and the obligation thereunder has imposed a loss annually, for the past two years, of more than one million dollars.

Your orator is informed and believes that the defendant having issued its bonds to the amount of about \$29,000,000.00, secured by a mortgage upon the line of railway of the New Orleans, Texas & Mexico Railway Company, which, with its owned and operated and connected lines extends from New Orleans, Louisiana, to Brownsville, Texas, because of its ownership of the stock of said New Orleans, Texas & Mexico Railway Company, and its obligations on the bonds thereof, has been compelled to pay annually a sum ranging between one and one and a half million dollars. That this great loss has been sustained by the destruction of the physical structures of said railroad, by extraordinary [fol. 5] floods and the interruption of traffic with its connecting lines in the Republic of Mexico by the rebellion therein.

#### Fifth

Your orator is informed and believes that the failure to meet the interest for dividends on the foregoing indebtedness, or any part thereof, when said interest matures, shall operate as a default under the mortgages or other instruments securing such indebtedness and render such mortgages and other instruments enforcible, and will permit the trustees of the respective mortgages or other instruments securing said indebtedness to bring suitable actions and proceedings to enforce the liens created by said mortgages or other instruments securing such indebtedness by the institution of actions for the foreclosure of said liens, or the enforcement of the other proper remedies granted by said mortgages or other instruments, in case of default in the performance by the defendant railroad company, of its covenants contained therein.

Your orator is informed and believes, and hence so avers that the annual interest charge payable in respect of the indebtedness hereinbefore mentioned exceeds the net revenues derived by the defendant from the operation of its properties.

Your orator further alleges, upon information and belief, that in the assets of the defendant, as stated in its published balance sheets are various securities, which are included therein at their par value, but that by reason of the financial and legal situation of the companies issuing the same and the present great financial stringency, are of far less value

than the par thereof.

Your orator avers, upon information and belief, that it is unable to meet its obligations as they mature, and has not now the means at hand with which to pay its floating liabilities for materials and supplies furnished, which amount upward of \$2,000,000.00.

#### Sixth

Your orator alleges that the defendant is indebted to it in the sum of Four Hundred Thousand Dollars, (\$400,000.00) evidenced by a promissory note of the said defendant for money loaned by your orator to the defendant in order to enable it to discharge its obligations under the various franchises and privileges granted to it in connection with the operation of its line of railroad; that the payment of said note has been duly demanded by your orator from the said [fol. 6] defendant, and the payment thereof refused, and the same is now due and unpaid, although said indebtedness is admitted by said defendant to be due, and payable by it to your orator; that said defendant has neglected to pay your orator the said indebtedness and claims to be unable so to do by reason of its financial condition.

#### Seventh

Your orator further alleges upon information and belief that to enable it to comply with the requirements of the Act of Congress and the laws of the various states in which its lines of railroad are situated, as well as with the lawful rules and orders of the Interstate Commerce Commission and the Railroad Commissions of said states with reference to the manner of operation of its lines of railroad and the conduct of its business as a common carrier, it will be necessary that said defendant should expend large sums of money, and the revenue and resources of the defendant, after the payment and discharge of its fixed obligations will be insufficient to admit of such expenditures, and that upon the failure to observe and comply with certain of said rules

and requirements that defendant will be and become subject to the payment of large fines and penalties enforcible against its property in preference and priority to the claims and demands of its general unsecured creditors.

#### Eighth

Your orator is informed and believes that defendant has outstanding floating indebtedness for materials and supplies furnished to it in amount upwards of Two Millions of Dollars (\$2,000,000.00); that said indebtedness is now overdue, that the defendant railroad company is unable to pay the same, and that the holders thereof are pressing for payment; that the defendant is without means to effect loans for the purpose of meeting such obligations and without col-

lateral available for such purposes.

Your orator is informed and believes and hence so charges that the defendant has no means at hand with which to meet its immediate and pressing needs in the operation of its railways, that many of the creditors to whom the defendant is liable are urgent in their demands for the immediate payment of their respective claims, and that some of said creditors will bring suit in respect to their said claims and may levy executions on the lines of railroad owned by the defendants and on the materials and supplies and other property of the defendant on hand and kept by the defendant for the necessary use in operating its lines of railroad; and your orator alleges upon information and belief that there is grave danger that the lines of railroad of the defendant may no longer be operated in a single system, [fol. 7] but may be broken up and separately operated; and that it is essential to the interests of the defendant and to the interests of the public and to your orator and its unsecured creditors that the property of the defendant should not be sacrificed or dismembered; that the only means whereby the defendant can pay the floating indebtedness and discharge its current obligations is by the continued maintenance and operation of said system of railroad as a whole, and by an uninterrupted use and enjoyment thereof; that any suits upon or process against its property or its revenues would seriously embarrass and cripple it and diminish, if not destroy, its power successfully to operate said

system, together with all of its appurtenances, and greatly impair its public usefulness; that notwithstanding the fact that every effort has been made to provide funds for the payment of the indebtedness of defendant, or for the extension of time of payment thereof, such efforts have proven prsuccessful, and that unless some definite action is taken on behalf of all the creditors, so that the operation of the defendant system may be kept intact, great and severe loss will be inflicted on all creditors.

#### Ninth

Your orator believes, and hence alleges, that unless this Court, in view of the facts above stated, shall take the railroads and properties of defendant railroad company into judicial custody for the protection of their interests therein, immediately upon default individual creditors will assert their rights and remedies in different courts; that the results will be a multiplicity of suits and a race of diligence; that attempts will be made to secure judgments and priorities; that levies will be made upon the rolling stock, materials and supplies indispensable to the operation of said lines of railroad, which will greatly interfere with and ultimately prevent the defendant from the proper performance of its duties as a common carrier, and will seriously diminish its earnings; and that it will be impossible to operate said lines of railroad as a whole, to the serious inconvenience of the public.

And your orator alleges that an attempt by your orator to enforce at law its claim would precipitate similar action on the part of other creditors, which, in turn, would lead to wasteful strife and controversy such as your orator believes can be avoided, and the property be preserved for equitable distribution amongst those entitled thereto only by the intervention of a court of equity and the granting of equitable relief, including the appointment of a receiver or receivers.

[fol. 8] Tenth

Your orator is further informed and believes, and hence so charges, that in the performance of the public duties of the defendant it is necessary that prompt payment be made by it of traffic balances, terminal charges and trackage rentals, involving business with other railroads and terminal companies, as the same become due, and that a failure to pay the same will result in the sacrifice of valuable rights of the defendant under leases and trackage contracts and the breaking off of the exchange of business by connecting carriers, resulting in largely decreased revenues.

#### Eleventh

That under the foregoing circumstances your orator alleges that the interference of a court of equity for the protection of your orator's ghts and the rights of all other parties in interest is immediately required, and especially for the timely appointment of a receiver or receivers to take charge of and preserve the property of the defendant to continue the operation of its lines of railroad for the accommodation of the public, and collect and receive and properly appropriate the income of said property under the orders of the court to be made from time to time until the final decree of the Court in the premises.

#### Twelfth

That this is a civil suit in the nature of a claim in equity, and the matter in dispute exceeds, exclusive of interest and costs, the sum of \$5,000.

Inasmuch, therefore, as your orator has no adequate remedy at law for its aforesaid grievances, and can have relief only in equity; your orator files this bill of complaint in behalf of itself and of other creditors of the defendant railroad company, who may come in and contribute to the expense hereof, and prays for equitable relief as follows:

(1) That the rights of your orator and of the other creditors of the defendant Railroad Company, including all holders of its mortgages, bonds and secured obligations, may be ascertained and decreed, and that the Court will fully administer the funds in which your orator is interested, constituting the entire property and assets of the defendant Railroad Company; and will, for such purpose,

marshal all the assets of the defendant Railroad Company and ascertain the several and respective liens and priorities existing upon each and every part of said property and assets, and enforce and decree the rights, liens and equities of the creditors of the defendant Railroad Company, as the same may be finally ascertained and decreed [fol. 9] by the court, in and to each and every portion of the property and assets of the defendant Railroad Company.

- (2) That for the purpose of preserving the unity and integrity of the railroads and property of the defendant Railroad Company and of preventing the disruption thereof by separate executions, attachments or sequestrations, or by the enforcements of liens upon separate portions thereof. and for the purpose of continuing the business of the defendant Railroad Company as a going concern and handling properly the earnings derived from the operation of said railroads and property and preventing commerce between the States being interfered with and a multiplicity of suits, a receiver or receivers be appointed by this Honorable Court of all and singular the railroads, rolling-stock, franchises, rights, property and premises of every kind and description and wheresoever located belonging to the defendant Railroad Company, together with the rents, issues, profits, revenues and income thereof, with full power and authority to demand, use, convey, collect and take into possession the goods, chattels, rights, credits, moneys, effects, lands, tenements, books, papers, and property of every kind and description belonging to the defendant Railroad Company and with the usual powers of receivers in such cases, and to operate said railroads and property and collect and receive the income and tolls thereof and apply the same under the order or decree of this Honorable Court, and to appoint such agents and attorneys as may be necessary to the proper management of all of said property and premises; and that the defendant, the Railroad Company, be decreed to make such transfers or conveyances to said receiver or receivers appointed as herein prayed, as may be necessary or proper.
- (3) That a writ of injunction may be issued out of and under the seal of this Honorable Court, directing, com-

manding, enjoining and restraining the defendant, the Railroad Company, and all persons, firms and corporations whatsoever and wheresoever located, situated or domiciled, from interfering with, transferring, selling or disposing of, attaching, levying upon, or in any manner whatsoever disturbing any part of the railroads and property now or hereafter in the possession of any receiver or receivers appointed in this cause.

- (4) That the defendant be required to answer all and singular the matters above stated.
- (5) That a writ of subpœna may be granted to your orator, to be directed to the defendant, thereby requiring the [fol. 10] defendant personally to appear on a certain day before the Court, and then and there full, true, direct and perfect answer make to all and singular the premises, but not under oath (answer under oath being hereby expressly waived) and, further, to perform and abide by such further order, direction or decree as to the Court shall seem meet.
- (6) That your orator may have such other and further relief in the premises as the nature and circumstances of this case may require and as to this Honorable Court shall seem meet.

And your orator, as in duty bound, will ever pray.

North American Co., by James Campbell, Its President. Sullivan & Cromwell, of Counsel. Thomas Bond, Atty. for Complainant.

Duly sworn to by James Campbell. Jurat omitted in printing.

(Here follows Exhibit "A," a memorandum concerning the funded and other fixed interest bearing debt, omitted as per stipulation filed Aug. 26th, 1924, hereinafter set out.)

#### [fol. 11] IN UNITED STATES DISTRICT COURT

ORDER APPOINTING RECEIVERS, ETC.-May 27, 1913

On reading and considering the verified bill of complaint in this cause and on motion of counsel for the complainant, and the defendant, the St. Louis and San Francisco Railroad Company appearing by its counsel and assenting thereto and upon due deliberation, It is Ordered, adjudged and decreed as follows:

- (1) That the said bill and answer be filed and the prayer of the bill for the appointment of a receiver or receivers in this cause be and the same is hereby granted.
- (2) That Thomas H. West and Benjamin A. Mitchell be and they are hereby appointed receivers and invested with the powers of receivers in equity of all the franchises, liens, claims, rights, interests and property of every name and nature, either at law or in equity and wherever situated, of the St. Louis and San Francisco Railroad Company, and they are hereby authorized and directed forthwith to take possession thereof, to preserve, manage, operate and use the same, to run and operate the railroads now held by said company by lease or otherwise and to conduct the business of said company according to law and in accordance with the principles, rules and practice in equity in cases of this character. They are authorized to apply to any other courts in this Circuit or any other Circuit for ancillary orders to assist them in the exercise of their powers and the discharge of their duties. They are authorized and directed to collect all moneys due and all moneys to become due to said company, to institute and prosecute such suits in their own names as receivers or in the name of the company, as [they] attorney may advise, to defend such suits as may be brought against them and those now pending or hereafter brought against the company which affect or may affect the property of which they now are or may become receivers. They are also authorized with the advice of their attorney to compromise and settle the amounts owing from one party to the other in suits between them and third parties and between the company and third parties in ordi-

nary cases arising out of the common operation of the railroad.

- (3) Out of the moneys coming to their hands they are authorized to pay, (1) the necessary expenses of operating the railroads and conducting the business during their receivership, (2) the taxes on the property, (3) the following claims incurred within six months preceding the date of this [fol. 12] order, the wages and salaries of employes of the company, the traffic and car mileage balances and accounts for car and equipment repairs.
- (4) It is hereby ordered that all persons, firms and corporations in possession of any of the property of which receivers are hereby appointed forthwith deliver the same to them or to their representatives or agents.
- (5) The railroad company and the officers, directors, agents, attorneys and employes thereof, and all other persons claiming to act by virtue of or under said railroad company, and all other persons, firms and corporations whatsoever and wheresoever situated, located or domiciled, are hereby restrained and enjoined from interfering with, attaching, levying upon or in any manner whatsoever disturbing any portion of the properties and premises of which receivers are hereby appointed, or from taking possession of or in any manner interfering with the same or any part thereof, or from interfering in any manner or preventing the discharge by said receivers of their duties or the operation of said properties and the premises under the order of this Court.
- (6) The receivers shall keep accurate accounts of their receipts and disbursements, take proper vouchers for their disbursements and file with the special master complete bimonthly reports of their receipts and disbursements with the accompanying vouchers. They shall file with him an inventory of the properties coming into their possession as soon as they can conveniently prepare it.
- (7) Within ten days from this date each of said receivers shall execute a bond with one or more sureties approved by this Court, or one of the Judges thereof, in the sum of \$100,000, for the benefit of whom it may concern, conditioned that they will well and truly perform the duties of

their offices and account for all moneys and properties which may come to their hands and abide by and perform all things which they shall be directed by the court to do and shall file this bond with the clerk of this Court.

(8) The complainant herein as well as the receivers may apply to any other court of competent jurisdiction for such order or orders in the premises as it may deem necessary in aid of the orders issued by this court.

(Signed) Walter H. Sanborn, Circuit Judge.

#### [fol. 13] IN UNITED STATES DISTRICT COURT

Order Granting Leave to File Intervening Petition of E. B. Spiller—February 21, 1921

Upon consideration of the application of E. B. Spiller, for leave to file intervening petition herein, which was verified December 2, 1920, and of the arguments of counsel for the respective parties upon the hearing of this application—

It is hereby ordered that the application be granted; that the applicant have leave to file petition; that the St. Louis and San Francisco Railway Company answer the petition or take such other action against it as it may be advised within twenty days after the service of this order upon at attorneys, and that the issues raised by the intervention, be and they are hereby referred to the Special Master for hearing, consideration and report of the facts and his conclusions.

(Signed) Walter H. Sanborn, Senior Circuit Judge.

Memorandum Opinion on Application Granting Leave to File Intervening Petition, etc.—Filed February 12, 1921

SANBORN, Circuit Judge:

In view of the opinion in Love vs. North American Company, 229 Fed. 123 and of the averments of the applicant's that on account of the necessity of first establishing their claims by the findings and orders of the Interstate Commerce Commission they could not have enforced them in the foreclosure proceedings at any time before February 1. 1916, the limit of the time fixed for presenting claims by the orders in those proceedings, that they have been diligently establishing these claims by necessary litigation before the Interstate Commerce Commission, the District Court and the Supreme Court, and that they notified the attorneys for the purchasers at the foreclosure sale before they paid for their purchase of their claims and their intention to press them, the court is not persuaded that they are barred in this court of equity from a presentation and consideration of their claims either by the orders limiting the time within which claims were to be presented in the foreclosure proceedings, or by the inexcusable laches of the applicants.

#### [fol. 14] IN UNITED STATES DISTRICT COURT

Intervening Petition of E. B. Spiller—Filed December 2, 1920

No. 4174. In Equity

NORTH AMERICAN COMPANY, Complainant,

VR

St. Louis & San Francisco Railroad Company, Defendant

No. 4174. In Equity

NORTH AMERICAN COMPANY, Complainant,

VS

St. Louis & San Francisco Railroad Company, Defendant

No. 4290. In Equity

JOINT RAILROAD COMPANY, Complainant,

VS.

St. Louis & San Francisco Railroad Company, Defendant

No. 4304. In Equity

Bankers Trust Company and Neill A. McMillan, as Trustees, Complainants,

VS.

St. Louis & San Francisco Railroad Company, Defendant

No. 4334. In Equity

GUARANTY TRUST COMPANY, Complainant,

VS.

St. Louis & San Francisco Railroad Company, Bankers Trust Company and Neill A. McMillan, as Trustees, Defendants

#### Consolidated Cause Final

Comes now E. B. Spiller, a citizen and resident of the State of Texas, and complaining of the said plaintiffs and of the said defendants and of the St. Louis & San Francisco Railway Company, and of the receivers in said cause, and pursuant to the final decree entered in the above entitled cause, at the City of St. Louis, on the 31st day of March, 1916, represents and shows to the Court, as follows:

- 1. That the defendant the St. Louis & San Francisco Railroad Company was at all times mentioned herein a common carrier engaged in the transportation of cattle in connection with other lines of railway, from points in Texas, Oklahoma and New Mexico, to Kansas City, St. Joseph and St. Louis, Missouri, National Stock Yards and Chicago, Illinois, New Orleans, Louisiana, and other live stock markets, and was a party to the tariffs, rates, fares and charges constituting joint rates and through rates from the points named in Appendix A to the order of the Inter-[fol. 15] state Commerce Commission hereinafter referred to and made a part hereof as an exhibit to this intervening petition, at the rates of shipment shown in said Appendix A.
- 2. That on the 12th day of January, 1914, the Interstate Commerce Commission, after full hearing and in all things

proceeding legally in the cause then pending before it. No. 732, entitled Cattle Raisers Association of Texas, et al. vs. Missouri, Kansas & Texas Railway Company, et al., to which the defendants St. Louis & San Francisco Railroad Company was a party, made its lawful order directing the defendant St. Louis & San Francisco Railroad Company and such other carriers named in said order, to pay to your intervening petitioner damages on account of charging the shippers named as consignors in said report and order unjust and unreasonable rates on shipments of cattle shown in said Appendix A, in the amounts therein named, said report and order of the Commission being unreported opinion No. A-583, hereto attached and made a part hereof as Exhibit "A." in which the unreasonable rates paid, the rates established by the Commission, the shipments made for which the unreasonable rates were paid, the amount of principal and interest as damages which the defendant and other carriers were directed severally to pay to the intervening petitioner, are fully set out in connection with the findings in said supplemental report and order of the said Interstate Commerce Commission, and in which amounts the shippers named as consignors who assigned their claims to intervening petitioner as therein shown were damaged by the defendant, St. Louis & San Francisco Railroad Company and said other carriers, respectively, as found by the said Commission and which your intervening petitioner, as assignee, as stated in said report of the Commission, is entitled to recover of the defendant and, St. Louis & San Francisco Railroad Company as follows:

Principal \$27,682.75 Interest \$2,529.56, Attorneys fees \$3,021.23 and costs and interest at six per cent per annum from August 1, 1916.

3. That the damages so claimed grow out of the fact that in the year 1903 the defendant, St. Louis & San Francisco Railroad Company, and other railway companies defendants in said cause No. 732, and their connecting carriers, being engaged in the business of transporting cattle and other freight from said points of origin mentioned in said Appendix A, to the markets of destinations, as shown in said Appendix A, on or about March, 1903, advanced the rates for transporting cattle from said points of origin

[fol. 16] stated in said Appendix A and from other points, to Kansas City, St. Joseph and St Louis, Missouri, National Stock Yards and Chicago, Illinois, New Orleans, Louisiana, and other points, the amount of the advancements applicable to shipments therein specified being the difference between the rates shown in the column of Appendix A marked "Rate paid" and the column marked "Rate ordered" which rate paid named in said Appendix A the shippers named as consignors in said list were compelled to pay to the defendant, St. Louis & San Francisco Railroad Company, on the shipments which they, respectively, made as therein shown, which advanced rates were found by the said Interstate Commerce Commission to be unjust and unreasonable and on account of the payment of which on the said shipments said St. Louis & San Francisco Railroad Company was ordered and directed to pay the said principal sum and interest to the intervening petitioner as assignee of the said shippers named as consignors, as shown in said report and order of the Commission, said Exhibit A hereto.

4. That after said rates were advanced and on February 10. 1904, the Cattle Raisers Association of Texas, a voluntary organization of live stock producers and shippers of Texas, Oklahoma and New Mexico, brought its complaint before the Interstate Commerce Commission against the said carrier and other carriers and their connecting lines of railway which had established said rates, alleging that said advanced rates were unjust and unreasonable, and the Commission, after full hearing of said complaint, in accordance with the Act to regulate commerce on August 16, 1905, by its report and opinion in cause No. 732, Cattle Raisers Association of Texas, et al. vs. Missouri, Kansas & Texas Railway Company, et al., reported in 11 I. C. C. 298, found it to be a fact that said advanced rates were unjust and unreasonable and in violation of Section 1 of the Act to Regulate Commerce, and therefore unlawful as shown by the report of the Commission in said cause last above referred to, which report and opinion as published by the Interstate Commerce Commission is hereby referred to, and this intervener asks that it be considered a part hereof. That said

advanced rates, notwithstanding the said decision of the Commission, remained in effect until November 17, 1908. That while the commission found as shown in its said report and opinion, that the said rates on cattle were advanced as aforesaid, and the advances thereof were unjust and nnreasonable, no formal order was made by the Commission consequent upon its said report and opinion, because the [fol. 17] complainant in that case, the Cattle Raisers Association, upon the promulgation of that report and opinion. made application to the Commission for more specific findings of fact, which application had not been decided or disposed of, but held under advisement by the Commission until the Act to regulate Commerce was amended by what is known as the Hepburn law, effective August 28, 1906, and which application for more specific findings of fact was still pending before the Commission on August 29, 1906.

5. That on August 29, 1906, the said complainant, the Cattle Raisers Association of Texas, in behalf of itself and its members and others similarly situated, who were engaged in the business of raising, buying and shipping cattle from the State of Texas, Oklahoma, New Mexico and Colorado, over said lines of railway, to the markets shown as points of destination in said Appendix A hereinbefore referred to, filed its petition with the Interstate Commerce Commission reaffirming its previous allegations of its petition filed with the Commission February 1, 1904, charging that the rates on eattle from the points hereinbefore mentioned to the destinations mentioned, and the advances in said rates, and the rates as advanced, were unjust and unreasonable, and praying that the Commission should proceed with such further hearing as it might deem necessary with respect to the allegations that said rates were unjust and unreasonable, and for an order of the Interstate Commerce Commission prescribing the just and reasonable rates and praying for an order of reparation against the defendants respectively on behalf of the members of the Cattle Raisers Association of Texas, as shippers, and others similarly situated, for their respective damages accruing by reason of the payment of said unjust and unreasonable rates.

That thereupon the Interstate Commerce Commission, after answers duly filed by all the said defendants therein

and their connecting carriers, proceeded to a full hearing of the matters contained in said petition, and after such full hearing as provided by law, the Interstate Commerce Commission on April 14, 1908, by its report and opinion, 13 I. C. C. 419, in said cause, found that said rates as advanced and the advances of said rates were unjust and unreasonable, as found in the previous opinion of the Commission as above [fol. 18] referred to, reported in 11 I. C. C. 298, the finding of the Commission in its said report of April 14, 1908, being in part as follows:

"It is our opinion, therefore, that the advances shown in the appendix to our former report, which were effected by the defendants during the year 1903, were unjust and unreasonable; that the present rates produced by those advances are unjust and unreasonable; that the rates in effect previous to said advances would be just as reasonable and ought not to be exceeded for the future."

The report and opinion of the Interstate Commerce Commission as shown by the official report in said cause, 13, I. C. C. 419 as here referred to and intervening petitioner asks that the same be taken as a part hereof. That in said report and opinion the Commission reserved for further consideration the matter of reparation when the specific claims thereafter should be presented.

That the Commission, in its said last named report, and by supplemental order in said cause, prescribed and fixed the reasonable rates for shipments of cattle from the points of origin named in said Appendix A hereinbefore referred to, to the destination therein named, being the same rates designated therein as "Rate ordered," which became effective November 17, 1908.

6. That the said parties named as consignors in said Appendix A above referred to, being the owners thereof, shipped the carloads of cattle as therein shown, from the points to the destinations shown in said Appendix A and paid to the defendant, St. Louis & San Francisco Railroad Company and other carriers named in said report the rate of freight named in the column marked "Rate paid," which rates as aforesaid were held by the Commission to be unjust, unreasonable and unlawful at the dates of said shipments,

in the amounts as named in said Appendix A and that said owners as shippers and consignors were thereby damaged by defendants respectively, in the amount of the unjust and unreasonable part of the rates as shown by the difference between "Rate paid" and "Rate ordered," as shown in Appendix A. The rate paid was as aforesaid found by the Commission to be unjust and unreasonable and the rate ordered was found to be the just and reasonable rate applicable to such shipments, when made.

7. And the intervening petitioner alleges that the facts as found by the Commission in said reports and opinion [fol. 19] were true and correct. That said shippers named in said Appendix A as consignors, and E. B. Spiller, as Secretary of the Cattle Raisers Association of Texas, and his predecessor in office, H. E. Crowley, in due time and in accordance with law, filed and caused to be filed with the Interstate Commerce Commission for and on account of the shippers named as consignors, and on account of said Spiller and Crowley as assignees for and on account of said shipment and freight paid, their petitions and claims for reparation for the amount of said unlawful charge which the Commission by its said report and order of January 12, 1914, Exhibit A hereto, directed the defendants to pay. That the said claims and the rights of the said owners as shippers and consignors as aforesaid were duly and legally assigned to E. B. Spiller, as shown in the report and order, Exhibit A hereof, so that he became and was at the date of said order, and now is, the legal and equitable owner and holder thereof and entitled to have and recover the damages resulting to said shippers by reason of the premises, and as such was entitled to have the order of the Interstate Commerce Commission as aforesaid ordering and directing the said carriers in said cause to pay said principal and interest, together with interest thereon, and is entitled to recover the same together with interest and attorneys' fees as provided by law.

8. That the said order of the Interstate Commerce Commission, Exhibit A hereof, directing the railroads therein named to pay the aforesaid damages as therein shown, was duly served upon each of the railway companies defendants herein, including St. Louis & San Francisco Railroad Com-

pany, but, though often requested, the said defendant, St. Louis & San Francisco Railroad Company, failed and refused and still fails and refuses to pay the same or any part thereof, and is therefore liable to the intervening petitioner in the full amount of said damages, principal, interest and attorneys' fees.

9. That thereafter and within one year from January 12, 1914, the date when said Interstate Commerce Commission ordered said defendant, St. Louis & San Francisco Railroad Company to pay to the intervening petitioner said sum of money as aforesaid, the intervening petitioner filed his petition in the District Court of the United States for the Western Division of the Western District of Missouri, against the said defendant, St. Louis & San Francisco Railroad Company and other railway carriers, setting up the facts as aforesaid and of the order of said Interstate Com-[fol. 20] merce Commission requiring said defendant to pay to the intervening petitioner said sum of money and praying citation in due form against said defendant and on final hearing a judgment for the aforesaid damages, interest, costs and attorneys' fees. That thereafter the said defendant, St. Louis & San Francisco Railroad Company, having been duly served with summons duly entered its appearance in said cause and said cause coming on thereafter to be heard upon the issues made by the pleadings therein, was tried and determined in said Court, a jury being waived by agreement and the facts found by the court as alleged and on the 16th day of August, 1916 judgment was rendered by said Court in favor of your intervening petitioner against said St. Louis & San Francisco Railroad Company for the sum of \$30,212.31, together with interest thereon from August 1, 1916 at six per cent per annum until paid and the further sum of \$3,021,23 as attorneys' fees for prosecuting said action, which the said court found to be reasonable and which attorneys' fees said Court adjudged should be taxed as costs in said case. A true and verified copy of that portion of said judgment referred to said St. Louis & San Francisco Railroad Company being hereto attached and marked Exhibit B and made a part hereof. That no part of said judgment has been paid, that thereafter an appeal from the said judgment of said District Court of

the United States for the Western Division of the Western District of Missouri was taken by the said defendant, St. Louis & San Francisco Railroad Company and said other carriers, to the United States Circuit Court of Appeals for the Eighth Circuit; that thereafter, to-wit, on or about the 11th day of March, 1918, said United States Circuit Court of Appeals reversed said judgment of said District Court and remanded said cause to said District Court for a new trial; that a copy of said judgment of said Court of Appeals is hereto attached, made a part hereof and marked Exhibit C; that thereafter and in due time, this intervening petitioner, by writ of [certiorani] appealed from said judgment of said United States Circuit Court of Appeals in said Eighth Circuit to the Supreme Court of the United States; that thereafter and about the 17th day of May, 1920, the Supreme Court of the United States reversed the judgment of said Circuit Court of Appeals of said Eighth Circuit and affirmed the judgment of said District Court of the United States for the Western Division of the Western District of Missouri, with costs, and remanded said cause to the said District Court; that a copy of said judgment is hereto attached made a part hereof and marked Exhibit D; [fol. 21] that thereafter and on or about the — day of July, 1920, this intervening petitioner filed his application and motion in said District Court of the United States for the Western Division of the Western District of Missouri for an order allowing additional attorneys' fees for the services of his attorneys in connection with the appeals of said cause in the Circuit Court of Appeals and in the Supreme Court; that thereafter and on or about the 10th day of July, 1920, said District Court for the said Western Division of the Western District of Missouri sustained said motion and application and made an additional allowance of attorneys' fees; that by the terms of said order and judgment allowing additional attorneys' fees, the total attorneys' fees ordered paid by the defendant St. Louis & San Francisco Railroad Company, in said cause was \$4,586.32 which amount was by said Court taxed as costs in said case against the defendant, St. Louis & San Francisco Railroad Company, a copy of said last mentioned order is hereto annexed marked Exhibit E.

That the defendant, St. Louis & San Francisco Railway Company has paid a part of the costs taxed against the St. Louis & San Francisco Railroad Company in said case, including \$3,351.00 as part of the attorneys' fees, leaving a balance due and unpaid of \$30,212.31 with interest from August 1, 1916 at six per cent per annum thereon, and also a balance of \$1,235.00 of said costs unpaid.

10. Your intervening petitioner further shows to the Court that subsequent to the collection of said excess charges by the said St. Louis & San Francisco Railroad Company, there was at all times in its treasury down to the date of the appointment of Thomas H. West and Benjamin L. Winchell as receivers thereof an amount of money equal to or in excess of the aggregate of the sum so collected in excess of the reasonable amount of said freights; that the gross receipts of the said St. Louis & San Francisco Railroad Company from the time of the collection of said excess charges down to the appointment of said receiver were in excess of its actual operating expenses, and since the appointment of said receiver the gross receipts have continuously been in excess of its actual operating expenses; that since the collection of said excess charges the said St. Louis & San Francisco Railroad Company has paid large sums in excess thereof, by way of interest on its mortgage indebtedness, and has expended for betterment and improvements large sums greatly in excess of said excess charges; that when said receivers were appointed they re-[fol, 22] ceived from the St. Louis & San Francisco Railroad Company, as shown by their inventory filed herein, in cash, over \$300,000,00; that eliminating all items except current receipts and current expenses, the earnings of said St. Louis & San Francisco Railroad Company, from the time of said excess charges were collected down to the appointment of said receiver were largely in excess of its operating expenses; that the money so paid by said shippers in excess of the reasonable and legal rate as fixed by said Interstate Commerce Commission, was illegal exaction and said money belonged to the shippers after the payment thereof the same as it did before such payment; that it was a part of the money in the treasury of the defendant company which passed to the receivers; that said money was not in any way subject to any liens of the mortgages or other instruments of writing executed by the defendant, St. Louis & San Francisco Railroad Company, and that by reason of the premises your intervening petitioners have a claim prior in lien and superior in equity to the liens and claims of any and all of the bondholders, trustees and mortgagees and other claimants holding claims or demands against said St. Louis & San Francisco Railroad Company; that it became and was the duty of said defendant Railroad Company and of its receivers and of the St. Louis & San Francisco Railroad Company to repay to the intervening petitioner the amount of said judgment, interest, attorneys' fees and costs.

11. That — is provided in and by Article ninth of the final decree heretofore entered in this cause that the purchaser of any of the property described in Article 26 or Article 27 of said decree and his or their successors ad assigns shall as part of the consideration for any and all of the purchase price of the property purchased, and and in addition to the sums bid by them and elsewhere in said decree required to be paid by him or them, take such property and receive the deeds or other instruments of conveyance and transfer thereof upon the express condition that he and they, or his and their successors or assigns shall pay, satisfy and discharge:

"B. Any unpaid claims or creditors of the defendant railroad company which have been or shall be admitted by the parties in interest or adjudged by this Court to be prior in lien or superior in equity to the refunding mortgage or the general lien mortgage."

It is further provided in and by the last paragraph of said Article 9 of the final decree, that:

[fol. 23] "In the event any purchaser, or successor or assigns, after demand made, shall refuse to pay any of the above mentioned indebtedness or liabilities which under the foregoing provision of this Article Ninth he is or may be required to pay, the person holding the claim, therefor upon twenty days notice to such purchaser, his successors or assigns, may file a petition in this court to have such

claim enforced against the property sold to such purchaser in accordance with the usual practice of this court in relation to payments of a similar character."

It is further provided by said final decree, that "all questions not hereby disposed of are reserved for future adindication", and by its last order made on the 29 day of January, 1918, the court further reserved unto itself jurisdiction in this cause for the purpose of determining questions and rights that may thereafter be presented to it. The intervenor states that its claim and justment as aforesaid is prior in lien and superior in equity to the refunding mortgages or to the general lien mortgages, by reason of the facts stated aforesaid: that the St. Louis & San Francisco Railway Company is the purchaser of the properties of the St. Louis & San Francisco Railroad Company sold under the decree of this court in these cases, and that it thereby acquired all money in the hands of the receivers not otherwise used and disposed of, in accordance with the order of this court. That the intervenor duly demanded of the said St. Louis & San Francisco Railway Company, payment of said judgment, interest and costs, after the same had been made final by the decision and mandate of the United States Supreme Court which payment the said St. Louis & San Francisco Railway Company, purchaser, as aforesaid, refused to pay. That intervenor heretofore on the 2nd day of December, 1920, gave to said St. Louis & San Francisco Railway Company as such purchaser, twenty days' notice of its intention to file this petition in this court to have such claim enforced against the property sold to it in accordance with the usual practice of this court in relation to payments of similar character.

12. Intervenor further states, that the St. Louis & San Francisco Railroad Company, the receivers thereof, all of the parties to this cause, and the said St. Louis & San Francisco Railway Company as purchaser of said property, had full knowledge and notice prior to the sale of said property under the order of this court and prior to the confirmation of said sale that this intervenor had such claim and that it was being prosecuted in the courts of this [fol. 24] circuit and in the Supreme Court of the United

States, and that intervenor's claim was prior in lien and superior in equity to the liens of said refunding bonds and of said general mortgage lien bonds and all other liens and claims against the defendant railroad company's property. That this intervenor and his attorneys had no knowledge or notice whatever of the order of this court requiring persons having any claims or demands against the said railroad company to present and file their claims herein within the time therein fixed, or at any time; that he had no knowledge or notice whatever of the final decree entered herein at the time the same was so entered or at the time said railroad properties were sold under said decree; that the first knowledge and notice that the intervenor and his attorneys, or any of them, had of said order of this court requiring the presentation of claims and of the final decree herein, was in August, 1916, at the time of the prosecution to this court of certain objections to the confirmation of the sale, at which hearing at St. Louis, Missouri, the intervenor's attorneys were present and they then and there gave notice to the attorneys for the Reorganization Committee and for the purchasers of said railroad, and for the said railway company and the said railroad company, and the attorneys for the said Guaranty Trust Company and the Bankers Trust Company, and all other parties to said cause, that the United States District Court for the Western Division of the Western District of Missouri, had given judgment on August 16, 1916, in intervenor's favor against the said railroad company for the amount as set forth above, and that intervenor would claim the same as prior in lien and superior in equity to the lien and claim of all of the other persons whosoever against the property of the said railroad company; that when this intervenor and his attorneys first learned of said order made by this court requiring all persons having any claims or demands to present the same on or before the 1st day of February, 1916, said time had expired; that intervenor was prosecuting his claim in the United States District Court for the Western Division of the Western District of Missouri, because he was required so to do by Sec. 16 of the Interstate Commerce act, which provides:

If the carrier does not comply with an order for the payment of money within the time limited in such order, the complainant, or any person for whose benefit such order was made, may file in the Circuit Court of the United States for the District in which he resides or in which is located the principal operating office of the carrier or [fol. 25] through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims the damages and the order of the Commis-

sion in the premises."

The railroad companies having failed to pay the amount ordered by the Interstate Commerce Commission on January 12, 1914, the only remedy intervenor had, was to follow the remedy prescribed by Act of Congress as set forth in said Section 16. The order of the Commission was dated January 12, 1914, which was duly served upon the said defendant railroad company and service thereof is acknowledged by it in subsequent proceedings based upon said order, prosecuted in the United States District Court for the Western Division of the Western District of Missouri. The receivers had been appointed by the order of this court in May, 1913. They therefore had knowledge, by virtue of the order so made and served upon said railroad company, of the amount found to be owing and due by said railroad company to your intervenor. Said railroad company by its attorneys, who were the same attorneys who acted for and in behalf of the receiver of said railroad company, appeared in said cause and actively defended the same, and took an appeal from the judgment of the United States District Court for the Western Division of the Western District of Missouri to the United States Circuit Court of Appeals for the Eighth Circuit, and there appeared and vigorously contested the decision of the said United States District Court, and also appeared and vigorously contested the decision of the United States Supreme Court in said case; that said railroad company gave bond for the costs that might accrue upon its appeal from the judgment of the United States District Court to the United States Circuit Court of Appeals, and afterwards recognizing its liability upon the bond and in order to protect its surety on said bond for costs, the defendant, St. Louis & San Francisco Railway Company has paid to the intervenor a part of the costs therein unpaid and for which its bondsmen would be liable.

The appointment of the receivers made on the petition of the bondholders was May 22, 1914, so that said receivers were in full charge of the defendant railroad Company's property at the time intervener commenced suit against the said railroad company and other railroad companies, to recover upon the orders made by the Interstate Commerce Commission. Said suits were first commenced at Fort Worth, in the State of Texas, which were afterwards dis-[fol. 26] missed because all of the railroad companies, including the St. Louis & San Francisco Railroad Company. objected to the jurisdiction, claiming a right to be sued in the district where their principal offices were located, or in some district where the railroads operate. To avoid the question of jurisdiction, therefore, said suit was commenced by the intervener at Kansas City, in the United States District Court for the Western Division of the Western District District of Missouri, against all of the carriers affected by said proceedings, and at the same time a separate suit was commenced in this court in this division against the said St. Louis & San Francisco Railroad Company and process served upon said railroad company, of which the said receivers had full notice and knowledge, which last named suit was afterwards dismissed after judgment had been rendered in the joint suit brought at Kansas City. That service of process in said said case at Kansas City. That service of process in said case at Kansas City was first had upon the agents of said Receivers and the defendant Railroad Company made a special appearance therein and objected to said service, whereupon further service was had upon said railroad company. It was due entirely to protracted litigation and determined efforts upon the part of the railroad company and of the said receivers and of the said purchaser of the Railway Company after the purchase of said railroad by it, to defeat the rights of the intervener and to have the courts decide that intervener had no claims of any kind against the railroad company. That said claim was not reduced to judgment in ample time for intervener to have intervened in this case and presented its demand against the said railroad company within the time ordered by the court. In tervener further states that the principal object of said order was to give notice to all persons dealing with the property and to advise the court of the fact that such claim did exist and that that object was fully obtained by the actual notice and knowledge on the part of the railroad company, of the receivers appointed by this court, and of all of the parties to this consolidated suit, and the attorneys, of the fact that such claim existed and was being prosecuted vigorously as possible in the courts of this circuit and of the United States Supreme Court. That intervener, in August, 1916, at the time of the argument of the objections to the confirmation of the sale made by the Master gave personal and written notice to Henry W. Taft and the other attorneys representing the Reorganization Committee, and the purchasers of the property the sale of which was then [fols. 27 & 28] asked to be confirmed; that said notice was given to them in the court room of the Honorable Walter H. Sanborn, Judge presiding where he was at the time sitting in St. Louis, Mo., of all the facts under which the judgment had been rendered by the said United States District Court at Kansas City, and that appeal had been taken, and that said case was then pending in the United States Court of Appeals.

Intervener further states, that no offer of any kind has ever been made by any of the parties to this case, either the defendant railroad company or the puchaser, the railway company, or any of the mortgage bondholders or others, to make any payment of this claim of the intervener, of any kind and nature, or to make any settlement whatsoever with the intervener on account thereof; so that intervener says that said Railway Company, said Railroad Company, said trustees and mortgage bondholders and stockholders have each and all had full knowledge and notice of the pendency of the intervener's claim and demand and of the na-

ture thereof.

Wherefere, the premises considered, intervener respectfully asks this court to make an order permitting it to file this, its intervening petition, to order that it be referred to a Master in Chancery, that upon a hearing it be ordered, adjudged and decreed by the court that this intervener has a just demand for the amount of said judgment, to-wit: Thirty Thousand Two Hundred Twelve and 31/100 (\$30, 212.31) with interest thereon from August 1, 1916 at six per cent per annum, and \$1,235.00 attorneys' fees taxed as costs; that is a just demand, prior in lien and superior in equity to the refunding mortgage and the general lien mortgage of the sand St. Louis & San Francisco Railroad Company, and that unless paid such claim be enforced against the property sold to the St. Louis & San Francisco Railway Company under the final decree of this court entered in this cause, in accordance with the usual practice of this court in relation to payments of claims of a similar character.

S. H. Cowan, B. F. Deatherage, Solicitors for Intervener.

Duly sworn to by B. F. Deatherage. Jurat omitted in printing.



31 266.59 87.72 280.43 Pages 4 to 51, both inclusive, of Exhibit A, which are bere omitted, set forth the names of claimants and the amounts of their claims 409.20 115.50 26.40 22.00 13.20 217.80 422.40 730.40 85.80 778.80 308.00 Rate | Amount refund Claims Against St. Louis & San Francisco Railroad Company, The Delivering Line In Each Shipment. dered. Cents. Intervening Petition of E. B. Spiller 39% 397 27% 29% 24.72 88 88 88 paid. Rate Cents 30% 30% 30% 4275 330,000 44,000 880,000 386,000 110,000 44,000 88,000 110,000 726,000 1,056,000 154,000 1,408,000 2,420,000 44,000 2,288,000 1,384,000 Weight. Pounds. Cars. No. National Stock Yards, Ill ... National Stock Yards, Ill ... National Stock Yards, Ill. National Stock Yards, Ill. Kansas City, Kans..... Kansas City, Kans.... against carriers other than the St. Louis-San Francisco Railroad Company. Destination. Kansas City, Kans. ....do.... ....do... Red Fork, Okla.... Kaufman, Tex... Weleetka, Okla. Okmulgee, Okla Talihina, Okla. Beggs, Okla... Tuttle, Okla... Ryan, Okla... ....do.... Origin. .do.... Tuttle, Okla EXHIBIT "A" TO Baker & Wigglesworth. (8). Baldridge, L. L. (S).... Baker & Strickler. (8)... & Barker, R. P. (8).... Allen, John. (8).... Barker & Thompson. Baker Bros. (S)... Consignor. Bailey & Townsend Baker & Brown... Allen & Mulkey. Ambrister Bros. Allen, O. T.

23.96.82		26.25	18.14		13.77	5.37		26.62	12.85	
71.50 23	46.20 26.40	72.60 26	46.20 33.00 13	19.80	36.30 13	13.20	05.60			8888
7	46 26	. 72			36		-	125.40	33.00	39.60 46.20 50.05 7.15
8 .	88 88	:	36%	371%	:	28%	24%	:	36	8888
30%	44	:	391/2	403%	:	321/2	33	:	39	4 4 2 2
572,000 301/4	154,000	242,000	132,000	66,000	132,000	44,000	132,000	176,000	110,000	132,000 154,000 154,000 22,000
26	r 4	=	9 49	000	9	22.63	9 2	œ	10	7 7 1
ор	op	,	dodo	do		Kansas City, Kans National Stock Yards, III.	do		do.	do do Kansas City, Kans. do
ф	Scullin, Okla Davis, Okla		Amber, Okla Ryan, Okla	Ada, Oklado.		doCameron, Tex	Red Oak, Okla Cameron, Okla		Stuart, Okla	Scullin, Okla
B. G. Barnes, Mgr., Indio Cattle Co. (8).	M. C. Barnes & Son. (8). Do.		Barnes, M. M. (S) Barrett, M. H. (S)	Barringer, J. L. (8)		Barringer, W. M. Batte, R. L. (S)	Battles & Denton		Battles, G. W	Beattie & Witherspoon. (S). Do. Do.

46.76	4.37		39.24		5.05	63.4	3.27	8.08	11.42	16.97	11.84	3.15	276.58	21.49	
143.00	13.20	39.65	118.25	7.70	15.40	13.20	06.6	19.80	26.40	39.60	30.25	8.25	679.80	52.25	378.40
-	88	30%	:	29%	:	39%	25%	39%	481/2	88	58	53	421/2	30%	30
	31	34	:	321/2	:	421%		42%	511/2	31				35%	33
462,000	44,000	242,000 132,000	374,000	22,000	44,000	44,000	198,000	66,000	88,000	132,000	242,000	330,000	2,266,000	110,000	1,892,000
21	63	11 8	17		2	00	90	c3 63	4	9	=	15	103	5 2	98
	фо	do National Stock Yards, Ill		Kansas City, Kansdodo		National Stock Yards, Ill	do	do	do	Kansas City, Kans	National Stock Yards, Ill	do	do	Kansas City, Kans	National Stock Yards, Illdodo
	Holdenville, Okla	Scullin, Okladodo		Chickasha, Okla Laverty, Okla		Rya , Okla	Vinita, Okla	Ada, Okla	Pierce. Tex.	Arapahoe, Okla	Bergs, Okla	Mounds, Okla	Brownwood, Tex	Beggs, Okla	
	Bedwell, J. A. (8)	Beeler, F. G. (S) Do		Belshe, F. N. Do.		0	Blocker, J. R. (S)	Bobbitt, A.A. (estate). (S).	Borden A P exec (S)	. ;	Com. Co. (S) Rrown & Biggerstaff	Brown, T. J.	Brownwood Oil Mill. (S).	Bucholtz, J. M. (S)	93

169.37	17.18	30.48	39.75			16.92	
437.80 169.37	52.80	84.70	90.75	31.35	17.60	48.95	
	391/2	38	53	30	83		
	421/2	411/2	30%	343/	31		
95 2,090,000	176,000	242,000	726,000	000,99	88,000	154,000	
95	00	=	83	00	4	7	
		Addington, Okla do	(S) Beggs, Okla do	Henryetta, Okla do	Okmulgee, Okla do		
	Burnett, C., & Co. (S)	Burnett, T. L	Cage Cattle Co. (S)	Cain & Kelley	Do		

Claims Against St. Louis & San Francisco Railroad Company, The Delivering Line In Each Shipment-Continued.

Consignor.	Origin.	Destination.	Cars.	Weight.	Rate paid.		Rate   Amount or of dered. refund.	Interest.
3			No.	Pounds.		Cents.	00	
Cartow, R. (S)	Kaufman, Tex	National Stock Yards, Ill	× 8	726,000	42%	39%	217.80	77.89
Cherryholm, T. H. (8)	Jacksboro, Tex	do	8	000,99		391/2	19.80	7.21
Chilton & Wills. (S)	Mounds, Okla	do	6	198,000		83	4.95	2.16
Chism, Thos	Beggs, Okla	do	7	154,000		53	19.25	7.48
Clark, P. R.	San Angelo, Tex	do	2	44,000	46	46	13.20	4.20
Clotfelter, J. H. (C) Do	Schulter, Okladodo	Kansas City, Kans National Stock Yards, Ill	6 15	132,000	88	30 30	33.00	
			21	482,000	:	:	132.00	49.86

76.22 8.67 23.79 1.84		9.53		151.35		88.88	21.44 .71 6.55	
287.60 26.40 72.60 4.40	6.60	26.40	6.60 198.00 118.80 77.00	400.40	162.25 85.80 6.60	254.65	55.00 1.65 19.80	6.60
28 88 88	88	:	39% 22% 24% 27%	:	282	:	38 88	36
20%	##		36%		30% 41 21%	:	3828	39
792,000 88,000 242,000 176,000	22,000	88,000	22,000 528,000 396,000 220,000	1,166,000	1,298,000 286,000 132,000	1,716,000	220,000 66,000 66,000	22,000
8418	- 60	*	1 2 8 1 0 1 0 1	53	13.0	78	10	
do do do	do.		do do Kansae City, Kans do		National Stock Yards, Illdo		do	op.
Mill Greek, Okla Roff, Okla Mounds, Okla	Scullin, Okla Mill Creek, Okla		Piover, Tex Weleetka, Okla do Chandler, Okla		Beggs, Okla Mill Creek, Okla Beggs, Okla		Cordell, Okla Mounds, Okla Stuart, Okla	doCalvin, Okla
Cloudt, F. (8) Cobb, J. K. & Co. (8) Cochman & Roff. (C) Coffman, W. L. (8)	- :		Com, J. W. (S). Do. Do. Do.		Cassidy, Courtney & Doerr. (1) Beggs, Okla Do		Crawford, J. P. (S) Crider & Russell. (S) Cumnings, A. M. (S)	Cummings, C. M. (8)

36									
4.33	19.32		55.44		157.37	8.90 10.13 166.64 1.45 9.65		6.92	33.78
13.20	59.40	23.10 16.50 6.60 27.50 52.80	126.50	14.30	486.20	20.90 30.80 409.20 3.30 22.00	6.60	16.50	92.40 82.50
:	98	288888	:	88 88	:	30% 411% 29 88 %	88	:	39%
:	39	33 40% 39	:	41. 7.14	:	367.7 39.7 30.7 30.7 30.7	391%	:	421/5
44,000	198,000	66,000 110,000 22,000 110,000 132,000	440,000	1,452,000	1,496,000	44,000 88,000 1,364,000 22,000 176,000	66,000	88,000	308,000
2	6	82-23	20	99	88	2 4 2 1 8	1 3	4	4 10
	ф.	Kansas City, Kans		do		Kanaas City, Kans	dodo		do
	Stuart, Okla	Tuskahoma, Okla Olney, Okla Scullin, Okla Coalgate, Okla Tuskahoma, Okla		Duncan, Okla		Madill, Okla Addington, Okla Dublin, Tex Wapanucka, Okla. Beggs, Okla.	Tishimingo, Okla Mill Creek, Okla		Ladonia, Tex Talihina, Okla
	Cummings & Moode. (S)	Davis Bros. (S) Do Do Do		Davis & Jennings. (S) Do		Davis, R. L. (8)	Dykes, W. L. (8)		Eaton, J. R. (8)
	34	1							

6.34	37.39	4.47	8 5	31.4	5.74			10.35	2.83			129.56
19.80	99.00	13.20	8 8	8.58	13.20	7.70	24.10	32.45	8.80	307.45	14.30	341.55
38	367%	301/2	88	8 8	21	12 5	8		21	30%	30%	
33	39 %	421/2	-	39	211/2	213%	30%	:	211%	34	# # 4	:
154,000	330,000	44,000	176,000	308,000	264,000	154,000	198,000	352,000	176,000	946,000	44,000	1,056,000
- 10	es =5	N	00	2	12	-	6	16	80	\$ -	00	48
do.	do	do.	do	do	Kansas City, Kans	do	National Stock Yards, Ill.		Kansas City, Kans	dodo	Kansas City, Kans	
Schulter, Okla	Kaufman, Tex	Kaufman, Tex	Beggs, Okla	Mill Creek, Okla	Beggs, Okla	do	фо		do	Scullin, Okla	Mull Creek, Okla do	
Elliott, S. H.	Fogleman, C. J.	French, W. A. (S)	2	Gatewood, F. W. (8)	B	Glasscock & Barksdale. (S)	Do		Glasscock, W. A. (S) do	Graham, J. W. (8)	Do Do	

Claims Against St. Louis & San Francisco Railroad Company, The Delivering Line In Each Shipment-Continued.

Consignor.	Origin.	Destination.	Cars.	Weight.	Rate Paid.	-	Rate Amount or of dered. refund.	Interest.
Gregg Bros. (S)	Ada, Oklado	National Stock Yards, Ill Kansas City, Kans	No.	Pounds. 110,000 44,000	Centa. 40 33½	37.1% 29.1%	\$27.50 17.60	
			1	154,000	:	:	45.10	\$14.95
Hall, R. L. Hamilton, J. R. Harness, J. H. (8).	Stuart, Okla San Angelo, Tex Chichasha, Okla	National Stock Yards, Ill dodo	8 8 8 8	66,000 66,000 66,000	8 8 8	8 8 8	19.80 19.80 26.40	6.38
Harrold & Barnes. (8) Do	Tuttle, Okla Amber, Okla Wynnewood, Okla	dododo.	8 7 10	44,000 154,000 638,000	31%	888	15.40 53.90 191.40	
			88	836,000	:	:	260.70	110.15
Haynes & Hogenkamp Hensley & Brummitt Hodges & Payne. Holder & Graham. (S)	Okmulgee, Okla Addington, Okla Mill Creek, Okla Scullin, Okla	dododododo	27.0	132,000 198,000 594,000 44,000	E # # E	8888	26.40 69.30 178.20 14.30	10.53 22.61 57.35 4.72
Holder, R. B. (8)	do	do	87	44,000	2 2	303,4	14.30	

																	35
7.08	8.34	29.31		12.13	8.63	6. 53 54. 53	22.35	2.80	4.31	32.07	11.52			43.36	37.40	19.53	
21.45	19.80	78.65	105.60	112.20	26.40	23.10	99	9.60	13.20	00.06	26.40	71.50	42.90	114.40	92.40	52.80	
-	88	88 88	88	:	39	88	-		8 8	æ	88	38	88	:	83	331/2	
•	30%	42%	39	:		32%	\$95.35		£ 4	7	4	411/4	411%	:	321/2	_	
000'99	66,000	242,000	352,000	374,000	88,000	66,000	220,000 \$95.35	44,000	154,000	33,000	88,000	220,000	132,000	352,000	264,000	176,000	
69	m ∞	8 =	19	17	4	64 65	9	ca .	~ 0	15	4	101	9	16	12	90	
	National Stock Yards, Illdo.	do	do		National Stock Yards, Ill	Kansas City, Kans	National Stock Yards, Ill.	фо	Kansas City, Kans	do.	ф	do.	do		Kansas Citv. Kans.	do	Dollars per car.
_	Stuart, Okla	Honey Grove, Tex Comanche, Okla	Holdenville, Okla		Woodville, Okla	Chicasha, Okla	Beaumont. Tex.	Wapanucka, Okla	Holdenville, Okla	Mill Creek, Okik	op	Comanche Okla	Dunean, Okla		Chickoshe Okla		
	Holdman, J. C. (S)	Holt, J. T. (S)	Huffman, H. L. (S)		Ingram, J. T. (C)	Inman & Thompson. (S).	Irwine & Mills (S)	Jackson, G. W.	Jackson, R. H.	James & Cardin	(S)	Lonnings W H (C)			Teles E & These (9)	C Johnson I A (8)	2 common to the control of

56.52 17.83 10.00		4.17		3.8	5.13	1.28	2.03		144.27
177.10 46.20 30.80	5.50	8.90	8.30	11.55	15.40 2.75 .55	3.30	6.60	237.60 79.20 130.90	447.70
33.33	88	:	28	:	***	:	3676	888	
######################################	30%		21%	:	28.2%	:	421/4	2 = ±	:
500,000 132,000 88,000	44,000	66,000	66,000	132,000	22,000	44,000	22,000	792,000 264,000 374,000	1,430,000
£ 0 4	0 -	60	m m	9	8	8	-	128	8
Rush Springs, Okla. National Stock Yards, Ill Addington, Okla dododo	op		Kansas City, Kans		op.	4	фо	dodo	
Rush Springs, Okla Addington, Okladodo	Beggs, Okla Okmulgee, Okla		Beggs, Oklado.		Addington, Okla Beggs, Okla. Mounds, Okla.		Terrell, Tex	Scullin, Okla Mill Creek, Okla Ravia, Okla.	
& Kapp, H. (8) Reith, G. J. (8) Keith, J. L. (8)	Kelley, J. E. Do.		Kennedy, L. W. (8)		Kerley, H. A. (8) Kimble & Co		King Broe.	King, Mrs. H. M. Do. Do.	

Claims Against St. Louis & San Francisco Railroad Company, The Delivering Line In Each Shipment-Continued.

Consignor,	Origin.	Destination.	Car.	Weight.	Rate paid.		Rate Amount or of dered. refund.	Interest.
Major, L. D. (8)	Ardmore, Okla Ryan, Okla	National Stock Yards, Ill	No. 255	Pounds. 550,000 616,000	Centa. Centa 411/5 38 421/5 391/5	Cents. 38 39½	\$192.50 184.80	
		,	23	1,166,000			377.30	\$143.25
March Bros. (8)	Schulter, Okla Comanche, Oklado.	dodo	8011	176,000 220,000 242,000	8 # # # # # # # # # # # # # # # # # # #	8 88 88	52.80 71.50 78.65	20.36 23.16 25.73

	33.49	13.46	32.26	8.91	31.08	5.23	69.05	8.71	87.00	28.11	38.38	1.4	30.96	43.03	9.20	6.96				19.74		31.46
8 8 8 8 8 8	101.20	33.00	85.80	27.50	96.25	13.20	178.20	10.80	198.00	80.10	82.50	4.40	20.40	132.00	21.45	17.60		33.00	26.40	59.40		92.40
30%	:	391/2	301%	8	28	8	8	8	8	241%	8	8	36	88	30%	58		88	36		-	3975
<del>+ + #</del>	:	421/2	423%		30%		**	83	æ		30%		40	7		31		31	38			42%
22,000 88,000	330,000	110,000	286,000	220,000	770,000	000'99	594,000	66,000	000,000	198,000	000,099	22,000	176,000	440,000	99,000	88,000		110,000	88,000	198.000		306,900
0 - 4	15.	3	13	9	38	0	22	8	8	0	8	-	00	8	8	4	-	10	4	0	-	<u>.</u> .
doKansas City, Kans		National Stock Yards, Ill	do	do.	National Stock Yards. Ill	ф	do	ф	do	do	do	do.	do	do.	Kansas City, Kans	National Stock Yards, Ill		Kansas City, Kans	National Stock Yards, Ill			do
Scullin, Okla Roff, Okla Scullin, Okla		Bowie, Tex	do	Beggs, Okla	Beern Okla	Okmulgee, Okla	Schulter, Okla	do	do	Cameron, Okla	Beggs, Okla	Okmulgee, Okla	Antlers, Okla	Seullin, Okla	do	Okmulgee, Okla		Holdenville, Okla	do			Ryan, Okla Okmulgee, Okla
A May, R. L. (S). O Do. Do.		Melton & Hodge. (S)		Miller, Bluford. (8)	Miller Bros. (S)			Mitchell & Parkinson. (8).	Mitchell-Selfridge&Co.(8).	Monke, W. C. (8)	=	_	Morgan, D. (8).	_		Newton, W. T. (8)		Oliphant, Alex. (8)				Orton, O. G. (8)

& T. A. (8).	Parkinson, Jas. & T. A. (8). Beggs, Okla	Kansas City, Kans	-	22,000 21% 21	3175	12	1.10	.47
Payne, W. L., & Son	Mill Creek, Okla	National Stock Yards, Ill Kansas City, Kans	28 24	44,000	3 2	30%	231.00	
			37	814,000	:	:	245.30	18.91
: :	Cement, Okla	do	-4	154,000	33%	20%	30.80	
			=	242,000	:	:	92.40	34.90
(8)	Mill Creek, Okla	doNational Stock Yards, Ill	6 57	1,254,000	¥ ±	30%	42.90	
			3	1,386,000	*	:	419.10	161.50
(S)	Okmulgee, Okla Holdenville, Okla Midlothian, Tex	Kansas City, Kans National Stock Yards, Ill	17 19	374,000 22,000 132,000	E E 23%	888	74.80 6.60 39.60	24.18 2.13 13.93
Pincham & Kirtley. (8). Do. Do. Do.	Weleetka, Okla Henryetta, Okla Wetumka, Okla Weicetka, Okla	Kansas City, Kans. National Stock Yards, III do	20-4	22,000 88,000 88,000	88327	22 22 22 23 23 24 25	13.20 94.05 8.25 33.00	
			16	352,000		:	148.50	\$6.10
(8)	Addington, Okla	ор	00	176,000	41%	88	61.60	23.82

14.25	6.65	15.03	36.11	14.00	4.26	26.44	2.19	6.5		13.88	11.35		60.37
39.60	19.80	46.20	92.40	42.90	13.20	99	6.60	19.80	16.50	41.25	35.20	42.90	185.90
28	331/2	391/2	38	88	28	361%	88	39%	28	•	88	88	:
							39		21%		33	4 7,4 7,4	:
198,000	99	154,000	308,000	132,000	44,000	220,000	22,000	000,000	330,000	528,000	176,000	132,000	572,000
6	0	7	14	9	2	01		0	15	22	8 œ	8 0	88
dp	Kansas City, Kans	National Stock Yards, Ill	do	do	Kansas City, Kans	National Stock Yards, Ill	do	op	Kansas City, Kans		op	op	
Okmulgee, Okla	Jacksboro, Tex	Ryan, Okla	Roff, Okla	Comanche, Okla	Amber, Okla	Elk, Okla	Holdenville, Okla	ryan, Okia	Beggs, Oklado.		Okmulgee, Okis Schulter, Okia	Comanche, Okla Duncan, Okla	
N Rawley, Dan. (S)	Kieh, J. K. (8)	30	=	Russell & Hubbard. (8)	Sacra, J. B. (8)	Scannell & Patterson. (8)	Scott, Edward. (C)	(O)	Sellman, R. (S) Do.		Severs, F. B. Shaw, F. M. (S)	Shaw & Jennings. (S) Do	

Claims Against St. Louis & San Francisco Railroad Company, The Delivering Line In Each Shipment-Continued.

Consignor.	Origin.	Destination.	Car.	Weight.	Rate paid.	Rate or- dered.	Amount of refund.	Interest.
Stine, J. H. (8).	Amber, Okla	Kansas City, Kansdo.	No. 52	Pounds. 1,188,000 308,000	Cents. 32 31½	Cents. 29 28	\$356.40 107.80	
			88	1,496,000	:		464.20	\$177.82
Slator, J. M., & Sons. (S) Smith, B. P. (S). Smith, T. J. South & Johnson. (S)	Scullin, Okla. Tuttle, Okla. do. Ravia, Okla.	National Stock Yards, Ill Kansas City, Kansdo National Stock Yards, Ill	20000	990,000 176,000 154,000 66,000	# # # # # # # # # # # # # # # # # # #	***	297.00 61.60 53.90 23.10	95.49 27.01 21.98 7.46
South, P. W. (8)	Mill Creek Okla	do	= *	242,000	2 %	30%	72.60	
			15	330,000	:		101.20	36.05
Spring, A. A., & Son. (8) Stewart, Cal Stroud, T. (S) Stubblefield, R. W.	Sugden, Okla. Scullin, Okla. do.	National Stock Yards, Ill do do	4 2 7 2 8	88,000 110,000 374,000 66,000	\$ = = =	8888	26.40 33.00 112.20 19.80	10.43 14.68 36.38 6.49
Sutherland, G.W., &Co. (8).		op	14	220,000	301/4	29 27%	27.50	

			75	528,000	:	:	119.90	52.70
Telisters D D /g/	Wedill Other	-	8	440 000	7117	96	18	8
Trailer & Co. (5)	Mill Carel, Oldo		3 -	900		8 8	3 3	3.0
Taylor, A. C. (5)	Holdenville Olde	Version City Version		88,88	7 6	8 8	10.90	0.0
rempressing Outputter (8)	noidenville, Okis	Dauber City, Datie	1	90,000	10	8	19.00	9.01
Thompson Bros. (8)	Beggs, Okla	do	21	462,000	211%	21	23.10	
Do	Henryetta, Okla	do	64	44,000	88	22%	15.40	
Do	Beggs, Okla	National Stock Yards, Ill	28	770,000	30%	28	96.25	
			28	1,276,000	:	:	134.75	58.58
Thompson & Gibson. (S) Do	do	Kanasa City, Kans National Stock Yards, Ill	18	396,000	21%	28	19.80	
			40	1,078,000	:	:	105.05	33.60
Thompson, U. S. (8)	do	do	= 8	242,000	30%	88	30.25	10.48
Three Circle Ranch	Bluffdale, Tex	do	3 4	88,000	27%	411/2	3 8 8	11.22
Todd, J. S. (8) Do	San Angelo, Tex Okmulgee, Okla	dodo.	19 2	44,000	49	\$ 8	13.20	
			21	462,000	:	:	96.80	33.03
Trout, N. T.	Roff, Okla	Kansas City, Kans	2	44,000	25	30%	14.30	4.65
Vale, J. M. (C)	Scullin, Okla	ор	16	352,000	34	30%	114.40	46.27
Waggoner, W. T. (8)	Bowie Tex	National Stock Varda, III.	0 0	132,000	4214	30%	20.80	14.08

26.07 15.32 121.05		57.58		70.779	41.58		261.98	26.69		49.29
46.20 61.60 277.20	159.50	171.60	1,470.70 343.20 66.00	1,879.90	99.00	23.10 382.80 283.80	689.70	99	52.25 69.30	121.55
888	23		38%	:	321/2	888		391/2	30%	:
222	30%	:	25. 25. 27.	:	36%	47,7	* * * * * * * * * * * * * * * * * * * *	421/2	351/2	:
132,000 176,000 792,000	1,276,000	1,518,000	4,202,000 1,144,000 220,000	5,566,000	264,000	66,000 1,276,000 946,000	2,288,000	220,000	110,000	309,000
38.86	88 ==	69	191 52 10	253	12	£3 £3	104	101	50	14
do.	do		National Stock Yards, Illdodo		ор	dodo.		op	Kansas City, Kans	
Ravia, Okla Ardmore, Okla Addington, Okla	Beggs, Oklado		Addington, Okla Bowie, Tex Ryan, Okla		Weleetka, Okla	Ardmore, Okla Mill Creek, Okla Tishomingo, Okla		Honey Grove, Tex	Madill, Okla	
Wall & McLish Warren, O. G. Washington&Davidson.(8)	Watson, Wm		Webb, Sidney. (S) Do		Weleetka Cattle Co. (8)	Westheimer & Daube. (8) Do Do		Whatley, W. W. (S)	Wiggs & Woody. (S) Do	45

8.53 27.78 157.29 2.57		63.28		Interest.		\$169.07		113.42	6.50
26.40 66.00 475.20 6.60	33.00	158.40	inued.	Amount of refund.	\$257.40 42.90 145.20	445.50	33.00	283.80	19.80
8 8 8 8	241%		t-Cont	Rate or- dered.	Cents. 30% 30% 30% 38%	:	88 88	:	36
38 88 88	31 271/2		hipmen	Rate paid.	Cents. 34 34 41	:	41		30
88,000 220,000 1,584,000 66,000	418,000	528,000	e In Each S	Weight.	Pounds. 792,000 132,000 484,000	1,408,000	836,000	946,000	99,000
401 22 8	19	24	ing Lin	Car.	No. 36	2	88 10	43	60
op op	Kansas City, Kansdodo.		Claims Against St. Louis & San Francisco Railroad Company, The Delivering Line In Each Shipment-Continued.	Destination.	Kansae City, KansdodoNational Stock Yards, Ill	-	do		do
Scullin, Okla	Holdenville, Okla Weleetka, Okla		uis & San Francisco R	Origin.	Scullin, Okla Mill Creek, Okla Scullin, Okla		doKingston, Okla		Stuart, Okla
Willia, H. Wilson, C. W. (S)	Wise & Autrey. (S)		Claims Against St. Lor	Consignor.	Witherspoon, J. F. (S) Do		Woods Lee. (S)		Woods, W. B.

46.20 14.80 13.75 4.44 30.60 12.93	35 770,000 42% 39% 5231.00 897.94
13.76 39.00	2281.00
\$2.8	3
	_
28.28	39%
41 41	42%
7 1164,000 411 38 6 112,000 41 38 8 132,000 41 38	770,000
6 6 Belive	28
mpany	Saunders, T. B. (S) Fort Worth, Tex New Orleans, La

[fol. 48] Exhibit "B" to Intervening Petition of E. B. Spiller

(Judgment)

No. 4308

E. B. SPILLER, Plaintiff,

VS.

Missouri, Kansas & Texas Railway Company, Missouri Pacific Railway Company, St. Louis & San Francisco Railroad Company Atchison, Topeka & Santa Fe Railway Company, Chicago, Rock Island & Pacific Railway Company, Chicago & Alton Railroad Company, St. Louis. Iron Mountain & Southern Railway Company, Chicago & Eastern Illinois Railroad Company, and Illinois Central Railroad Company, Defendants.

Now on this day this cause coming on regularly to be heard and considered, all of the parties plaintiff and defendants, by their respective attorneys, having heretofore appeared and having by written stipulation herein waived a jury and submitted this cause to the Court, and all of the evidence having been heretofore introduced, seen and heard by the Court and briefs of counsel having been submitted, seen and read by the Court and oral arguments of counsel having been duly heard by the Court, the Court now being fully advised in the premises, finds all of the issues made by the pleadings both of law and fact in favor of the plaintiff and finds the facts to be as stated in the first count of plaintiff's petition herein.

It is further ordered, adjudged and decreed by the Court that Plaintiff E. B. Spiller do have and recover of and from the defendant, St. Louis & San Francisco Railroad Company the sum of Twenty-seven Thousand Six Hundred Eighty-two and 75/100 Dollars (\$27,682.75) being the amount of principal and interest ordered by the Interstate Commerce Commission to be paid to the plaintiff E. B. Spiller by the said St. Louis & San Francisco Railroad Company on or before June 15, 1914, and do have and recover of and from said defendant the further sum of Two Thousand Five

Hundred Twenty-nine and 56/100 Dollars (\$2,529.56) being the interest at six per cent per annum on said sum of \$27,-682.75 from June 15, 1914 to Aug. 1, 1916, being a total sum of Thirty Thousand Two Hundred Twelve and 31/100 Dollars (\$30,212.31) together with interest thereon from Aug. 1, 1916 at six per cent per annum until paid; and that plaintiff have and recover of and from said St. Louis & San Francisco Railroad Company the further sum of Three Thousand Twenty-one and 23/100 Dollars (\$3,021.23) as at [fol. 49] torneys' fees for prosecuting this action, which sum the court finds to be reasonable, which attorneys' fees shall be taxed as costs herein; and that the plaintiff also have and recover of said St. Louis & San Francisco Railroad Company his costs herein laid out and expended, for all of which let execution issue.

Arba S. Vanvalkenburg, Judge.

Aug. 16, 1916.

UNITED STATES OF AMERICA, Set:

I, John B. Warner, Clerk of the District Court of the United States for the Western Division of the Western District of Missouri, do hereby certify that the foregoing is a true copy of the judgment entry of August 16, 1916, in the cause therein named, as fully as the same appears in my office.

Witness my hand as clerk, and the seal of said Court. Done at office in Kansas City, Missouri, this 26th day of August, A. D. 1916.

John B. Warner, Clerk. (Seal.)

EX. C TO INTERVENING PETITION OF E. B. SPILLER

#### 4308

United States Circuit Court of Appeals, September Term, 1917

#### No. 4824

St. Louis & San Francisco Railroad Company, Plaintiff in Error,

VS.

#### E. B. SPILLER

Mandate.—Filed Mar. 27, 1918. John B. Warner, Clerk. C. J. Murray, D. C.

United States of America to the Honorable the Judges of the District Court of the United States for the (Seal.) Western District of Missouri, Greeting:

Whereas, lately in the District Court of the United States for the Western District of Missouri, before you, or some [fol. 50] of you, in a cause between E. B. Spiller, plaintiff, and The Missouri, Kansas & Texas Railway Company, Missouri Pacific Railway Company, St. Louis & San Francisco Railroad Company, Atchison, Topeka & Santa Fe Railway Company, Chicago, Rock Island & Pacific Railway Company, Chicago & Alton Railroad Company, St. Louis, Iron Mountain & Southern Railway Company, Chicago & Eastern Illinois Railroad Company, and Illinois Central Railroad Company, defendants, wherein the judgment of the said District Court in said cause, entered on the 16th day of August, A. D. one thousand nine hundred and sixteen was in the following words, viz:

(A copy of the judgment is set out in full in the mandate issued in the case of the Atchison, Topeka & Santa Fe Railway Company, Plaintiff in Error vs. E. B. Spiller No. 4819.)

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals, Eighth Circuit, by virtue of a writ of error prayed by and allowed to the defendant, St. Louis & San Francisco Railroad Company, agreeably to the Act of Congress in such case made and provided, fully and at large appears:

And whereas at the September term, in the year of our Lord one thousand nine hundred and seventeen, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the transcript of record from the said District Court, and was argued by counsel.

In consideration whereof, it is now here ordered and adjudged by this court, that so much of the judgment of said District Court in this cause, from which this writ is prosecuted, be and the same is hereby, reversed with costs; and that the St. Louis & San Francisco Railroad Company have and recover against E. B. Spiller the sum of Thirty-three and 70/100 Dollars for its costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court, with directions

to grant a new trial.

October 29, 1917.

And thereafter on March 11, 1918, an order was entered in said Circuit Court of Appeals on the petition for a rehearing filed by counsel for defendant in error in said causes Nos. 4819 to 4827, which said order is set out in the [fol. 51] mandate issued in case No. 4819, The Atchison, Topeka & Santa Fe Railway Company vs. E. B. Spiller.

You, therefore, are hereby commanded that such execution and further proceedings [he] had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 26th day of March in the year of our Lord one thousand nine hundred and eighteen.

E. E. Koch, Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Costs of plaintiff in error: Clerk, 13.70; printing record, printed with No. 4819; attorney, 20.00; attorney, 33.70.

Ex. D to Intervening Petiton of E. B. Spiller

No. 4308. File No. 26598

Supreme Court of the United States, October Term, 1919

No. 142

E. B. SPILLER

VS.

St. Louis & San Francisco Railroad Company

Mandate—Filed June 6, 1920. Edwin R. Durham, Clerk, by C. J. Murray, Deputy

UNITED STATES OF AMERICA, 88:

The President of the United States of America to the Honorable the Judge of the District Court of the (Seal.) United States for the Western District of Missouri, Greeting:

Whereas lately in the United States Circuit Court of Appeals for the Eighth Circuit, in a cause between St. [fol. 52] Louis & San Francisco Railroad Company, plaintiff in error and E. B. Spiller, defendant in error, No. 4824, wherein the judgment of the said Circuit Court of Appeals, entered in said cause on the 29th day of October, A. D. 1917, is in the following words, viz:

"This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that so much of the judgment of said District Court, in this cause, from which this writ of error is prosecuted, be, and the same is hereby, reversed with costs; and that the St. Louis & San Francisco Railroad Company have and recover against E. B. Spiller the sum of Thirty-three Thousand and 70/100 dollars, for its costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to grant a new trial." as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals, which was brought into the Supreme Court of the United States by virtue of a writ of certiorari agreeably to the act of Congress, in such case made and provided, fully and at large appears;

And whereas, in the present term of October in the year of Our Lord nineteen hundred and nineteen, the said cause came on to be heard before the Supreme Court, on the said

transcript of record, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said United States Circuit Court of Appeals in this cause be, and the same is hereby reversed with costs, and that the judgment of the District Court of the United States for the Western District of Missouri in this cause be, and the same is hereby, affirmed with costs; and that the said defendant in error, E. B. Spilller, recover against the said plaintiff in error for his costs herein expended and have execution therefor.

And it is further ordered, that this cause be, and the same is hereby remanded to the said District Court. May 17,

1920.

You therefore are hereby commanded that such execution and proceedings be had in said cause, as according to right [fol. 53] and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 2nd day of July in the year of our Lord Nineteen Twenty.

James D. Maher, Clerk of the Supreme Court of the United States.

Costs of defendant in error: Clerk, printing record, attorney paid by plaintiff in error.

EXHIBIT "E" TO INTERVENING PETITION OF E. B. SPILLER

No. 4308

E. B. SPILLER

VS.

Missouri, Kansas & Texas Railway Company, Missouri Pacific Railway Company, St. Louis & San Francisco Railroad Company, Atchison, Topeka & Santa Fe Railway Company, Chicago, Rock Island & Pacific Railway Company, Chicago & Alton Railroad Company, St. Louis, Iron Mountain & Southern Railway Company, Chicago & Eastern Illinois Railroad Company, and Illinois Central Railroad Company, Defendants.

Order Sustaining Motion of Plaintiff to Tax Attorneys' Fees

Now on this day this cause coming on further to be heard and considered upon the motion of plaintiff for an order of court taxing an additional attorneys fee for the services of petitioner's attorneys in the United States Circuit Court of Appeals and in the United States Supreme Court, and it appearing that the mandates of the Supreme Court of the United States having been received and filed in this court. directing the reversal of the judgment of the United States Circuit Court of Appeals and the affirmance of the judgment of this court heretofore rendered herein, comes the plaintiff by his attorneys, and names defendant, Missouri, Kansas & Texas Railway Company, by J. W. Jamison, its attorney, and come the Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Com-[fol. 54] pany, by Thomas J. Hackney, their attorney, and come the St. Louis & San Francisco Railroad Company and the Chicago & Eastern Illinois Railroad Company, by H. S. Conrad, of Guthrie, Conrad & Durham, their attorneys, comes the Chicago, Rock Island & Pacific Railway Company, by Frank P. Sebree, its attorney, and comes Chicago & Alton Railroad Company, by Charles M. Miller, its attorney, and come the Atchison, Topeka & Santa Fe Railway Company and the Illinois Central Railroad Company, by T. J. Norton and Cyrus Crane, their attorneys, and it appearing

that all of the said defendants have received due notice for the taking up of said motion at this time and all of them appearing in court by their respective attorneys as aforesaid, said motion is taken up and the evidence and record in the case and arguments of counsel upon said motion being seen, heard and fully considered by the court, the court finds that the said motion should be sustained, and the court further finds that a reasonable attorneys' fee for the plaintiffs attorneys for their services in this court and also in the United States Circuit Court of Appeals for the Eighth Circuit and in the United States Supreme Court herein, is Twenty-five thousand Dollars (\$25,000.00) and that in addition to the amount of attorneys' fees heretofore allowed by this court in this case, there should be allowed to the plaintiff such additional sum as to make the entire fee \$25,000.00.

Wherefore, it is considered, ordered and adjudged by the court, that the motion of plaintiff for the allowance of additional attorneys' fees is hereby sustained and that plaintiff have and recover of and from the defendants the amount of ten per cent heretofore allowed by this court on the amount of the judgment and interest at the time of entering said judgment, and in addition thereto the further sum of \$8,528.13, making a total of \$25,000,00 to be allowed and taxed as part of the costs in this case for plaintiff's attornevs' fees, said additional sum to be apportioned among the several defendants in accordance with the amount of the judgments heretofore rendered against said several defendants: That is to say, plaintiff shall have and recover of and from the Atchison, Topeka & Santa Fe Railway Company the sum of \$4,317.42 heretofore allowed as attorneys' fees and now allowed as attorneys' fees for services of plaintiff's attorneys in District Court for the Western Division of the Western District of Missouri in this case, and in addition thereto that plaintiff have and recover of and from the said Atchison, Topeka & Santa Fe Railway Company the further sum of \$2,235.12 as attorneys' fees for services of plaintiff's atorneys in the United States Court [fol. 55] of Appeals and United States Supreme Court, all of which said attorneys' fees shall be taxed up as part of the costs in this case.

Plaintiff shall have and recover of and from the Chicago & Eastern Illinois Railroad Company the sum of \$206.34,

heretofore allowed as attorneys' fees and now allowed as attorneys' fees for services of plaintiff's attorneys in the District Court for the Western Division of the Western District of Missouri, in this case, and in addition thereto that plaintiff have and recover of and from the said Chicago & Eastern Illinois Railroad Company the further sum of \$106.82 as attorneys's fees, for services of plaintiff's attorneys in the United States Circuit Court of Appeals and the United States Supreme Court, all of which said attorneys' fees shall be taxed up as part of the costs in this case.

Plaintiff shall have and recover of and from the Chicago & Alton Railroad Company to sum of \$85.97 heretofore allowed as attorneys' fees and now allowed as attorneys' fees for services of plaintiff's attorneys in the District Court of the Western Division of the Western District of Missouri, in this case, and in addition thereto that plaintiff have and recover of and from the said Chicago & Alton Railroad Company the further sum of \$44.50 as attorneys' fees for services of plaintiff's attorneys in the United States Circuit Court of Appeals and in the United States Supreme Court, and all of which said attorneys' fees shall be taxed up as part of the costs in this case.

Plaintiff shall recover of and from the Missouri Pacific Railway Company the sum of \$35.05 heretofore allowed as attorneys' fees and now allowed as attorneys' fees for services of plaintiff's attorneys in the District Court of the Western Division of the Western District of Missouri, in this case, and in addition thereto that plaintiff have and recover of and from the Missouri Pacific Railway Company the further sum of \$18.15 as attorneys' fees for services of plaintiff's attorneys in the United States Circuit Court of Appeals and the United States Supreme Court, and all of which said attorneys' fees shall be taxed up as part of the costs in this case.

Plaintiff shall have and recover of and from the St. Louis, Iron Mountain & Southern Railway Company, the sum of \$416.59 heretofore allowed as attorneys' fees and now allowed as attorneys' fees for services of plaintiff's attorneys in the District Court of the Western Division of the Western District of Missouri, in this case, and in ad-[fol. 56] dition thereto that plaintiff have and recover

of and from the said St. Louis, Iron Mountain & Southern Railway Company the further sum of \$15.67 as attorneys' fees for services of plaintiff's attorneys in the United States Circuit Court of Appeals and the United States Supreme Court, and all of which said attorneys' fees shall

be taxed up as part of the costs in this case.

Plaintiff shall have and recover of and from the St. Louis & San Francisco Railroad Company the sum of \$3,021.23 heretofore allowed as attorneys' fees for services of plaintiff's attorneys in the District Court of the Western Division of the Western District of Missouri, in this case, and in addition thereto that the plaintiff shall have and recover of and from the said St. Louis & San Francisco Railroad Company the further sum of \$1.564.09 as attorneys' fees for services of plaintiff's attorneys in the United States Circuit Court of Appeals and the United States Supreme Court, and all of which said attorneys' fees shall be taxed up as part of the costs in this case.

Plaintiff shall have and recover of and from the Chicago, Rock Island & Pacific Railway Company the sum of \$2,034.60 heretofore allowed as attorneys' fees and now allowed as attorneys' fees for services of plaintiff's attorneys in the District Court of the Western Division of the Western District of Missouri, in this case, and in addition thereto that the plaintiff have and recover of and from the said Chicago, Rock Island & Pacific Railway Company the further sum of \$1,053.00 as attorneys' fees for services of the plaintiff's attorneys in the United States Circuit Court of Appeals and in the Supreme Court, and all of which said attorneys' fees shall be taxed up as part of the costs in this case.

Plaintiff shall have and recover of and from the Illinois Central Railroad Company the sum of \$178.84 heretofore allowed as attorneys' fees and now allowed as attorneys' fees for services of plaintiff's attorneys in the District Court of the Western Division of the Western District of Missouri, in this case, and in addition thereto that plaintiff have and recover of and from said Illinois Central Railroad Company the further sum of \$92.58 as attorneys' fees for services of plaintiff's attorneys in the United States Circuit Court of Appeals and the United States

Supreme Court, and all of which said attorneys' fees shall

be taxed up as part of the costs in this case.

Plaintiff shall have and recover of and from the Missouri, Kansas & Texas Railway Company the sum of [fol. 57] \$6,176.43 heretofore allowed as attorneys' fees and now allowed as attorneys' fees for services of plaintiff's attorneys in the District Court of the Western Division of the Western District of Missouri, in this case, and in addition thereto that the plaintiff have and recover of and from said Missouri, Kansas & Texas Railway Company the further sum of \$3,197.53 as attorneys' fees for services of plaintiff's attorneys in the United States Circuit Court of Appeals and the United States Supreme Court, and all of which said attorneys' fees shall be taxed up as part of the costs in this case.

(Signed) Arba S. Van Falkenburg, Judge.

# IN UNITED STATES DISTRICT COURT

Order Granting Leave to File Intervening Petition of E. B. Spiller et al.—February 12, 1921

Upon consideration of the application of E. B. Spiller, et al., for leave to file their intervening petition herein, which was verified December 2, 1920, and of the arguments of counsel for the respective parties upon the hearing of this application—

It is hereby ordered that the application be granted; that the applicants have leave to file their petition; that the St. Louis and San Francisco Railway Company answer the petition or take such other action against it as it may be advised within twenty days after the service of this order upon its attorneys, and that the issues raised by the intervention, be and they are hereby referred to the Special Master for hearing, consideration and report of the facts and his conclusions.

(Signed) Walter H. Sanborn, Senior Circuit Judge.

### IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION ON APPLICATION GRANTING LEAVE TO FILE INTERVENING PETITION—Filed February 12, 1921

SANBORN, Circuit Judge:

In view of the opinion in Love vs. North American Company, 229 Fed. 123 and of the averments of the applicants. that on acount of the necessity of first establishing their claims by the findings and orders of the Interstate Com-[fol. 58] merce Commission they could not have enforced them in the foreclosure proceedings at any time before February 1, 1916, the limit of the time fixed for presenting claims by the orders in those proceedings, that they have been diligently establishing these claims by necessary litigation before the Interstate Commerce Commission, the District Court and the Supreme Court, and that they notified the attorneys for the purchasers at the foreclosure sale before they paid for the purchase of their claims and their intention to press them, the court is not persuaded that they are barred in this court of equity from a presentation and consideration of their claims either by the orders limiting the time within which claims were to be presented in the foreclosure proceedings or by the inexcusable laches of the applicants.

# IN UNITED STATES DISTRICT COURT

## Consolidated Cause-Final

### [Title omitted]

Intervening Petition of E. B. Spiller, Bailey & Townsend, Baker & Brown, W. M. Barringer, Battles & Denton, G. W. Battles, F. N. Belshe, Boedecker & Ball, T. J. Brown, Cain & Kelley, Thomas Chism, Tom Durant, S. H. Elliott, R. M. Evans, C. J. Fogleman, R. L. Hall, J. R. Hamilton, Haynes & Hokenkamp, Hensley & Brumit, Hodges & Payne, C. W. Jackson, R. H. Jackson, James & Cardin, James & Jamison, J. E. Kelley, Kimble & Co., King Bros., Lance & Charley, Murrell & Clary, W. L. Payne & Son, J. J. Pickens, F. B. Severs, T. J. Smith, Cal Stewart, R. W. Stubblefield, Three Circle Ranch, N. T. Trout, Frank Vincent, Wall & McFish, O. G. Warren, H. Willis, W. D. Woods, J. A. Wynne, Yohoko Farm & Stock Co.—Filed [fol. 59] Dec. 2, 1920

Come now E. B. Spiller, Baley & Townsend, Baker & Brown, W. M. Barringer, Battles & Denton, C. W. Battles, F. N. Belshe, Boedecker & Ball, T. J. Brown, Cain & Kelley, Thomas Chism, Tom Durant, S. H. Elliott, R. M. Evans, C. J. Fogleman, R. L. Hall, J. R. Hamilton, Haynes & Hogenkamp, Hensley & Brumit, Hodges & Payne, G. W. Jackson, R. H. Jackson, James & Cardin, James & Jamison, J. E. Kelley, Kimble & Co., King Bros., Lance & Charley, Murrell & Clary, W. L. Payne & Son, J. J. Pickens, F. B. Severs, T. J. Smith, Cal Stewart, R. W. Stubblefield, Three Circle Ranch, N. T. Trout, Frank Vincent, Wall & McFish, O. G. Warren, H. Willis, W. D. Woods, J. A. Wynne, and Yohoka Farm & Stock Company, and complaining of the said plaintiffs and of the said defendants and of the St. Louis & San Francisco Railway Company, and of the receivers in said causes, and pursuant to the final decree entered in the above entitled cause, at the City of St. Louis, on the 31st day of March, 1916, represent and show to the court as follows:

1. That defendant St. Louis & San Francisco Railroad Company was at all times mentioned herein a common carrier engaged in the transportation of cattle in connection with other lines of railway, from points in Texas, Oklahoma and New Mexico, to Kansas City, St. Joseph and St. Louis, Missouri, National Stock Yards and Chicago, Illinois, New Orleans, Louisiana, and other live stock markets, and was a party to the tariffs, rates, fares and charges, constituting joint rates and through rates from the point named in Appendix A to the order of the Interstate Commerce Commission hereinafter referred to and made a part hereof as an exhibit to this intervening petition, at the rates of shipment shown in Appendix A.

[fol. 60] 2. That on the 12th day of January, 1914, the Interstate Commerce Commission, after full hearing and in all things proceeding legally in the cause then pending before it, No. 732, entitled Cattle Raisers Association of Texas, et al. . . Missouri, Kansas & Texas Railway Company, et al., to which the defendant, St. Louis & San Francisco Railroad Company was a party, made its lawful order directing the defendant, St. Louis & San Francisco Railroad Company and such other carriers named in said order to pay to the shippers therein named damages on account of charging the shippers named as consignors in said report and order unjust and unreasonable rates on shipments of cattle shown in said Appendix A, in the amounts therein named, said report and order of the Commission being unreported opinion No. A 583, hereto attached and made a part hereof as Exhibit A, in which the unreasonable rates paid, the rates established by the commission, the shipments made for which the unreasonable rates were paid, the amount of principal and interest as damages which the defendant St. Louis & San Francisco Railroad Company and other carriers were directed severally to pay to the said shippers, are fully set out in connection with the findings in said supplemental report and order of said Interstate Commerce Commission, and in which amounts the shippers named as consignors as therein shown were damaged by the defendant, the St. Louis & San Francisco Railroad Company and said other carriers, respectively, as found by the said Commission, and which other intervening petitioners and E. B. Spiller as assignee are entitled to recover of the defendant St. Louis & San Francisco Railroad Company, as follows:

Baily & Townsend:	
Principal	\$22.00
Interest	8.60
Int. from 6-15-14	3.90
Total	34.50
Attorney's fee	3.45
Baker & Brown:	
Principal	13.20
Interest	4.26
Int. from 6-15-14	2.22
Total	19.63
Attorney's fee	1.96
W. M. Barringer:	
Principal	13.20
Interest	4.48
Int. from 6-15-14	2,25
[fol. 61] Total	19.63
Attorney's fee	1 99
Battles & Denton:	
Principal	125.40
Interest	00 08
Int, from 6-15-14	21.08
Total	186.45
Attorney's fee	18.64

G. W. Battles:	
Principal	33.00
Interest	12.85
Int. from 6-15-14	5.88
	74 00
Total	
Attorney's fee	5.16
F. N. Belshe:	
Principal	15.40
Interest	5.05
Int. from 6-15-14 .	2.60
Total	23.05
Attorney's fee	2.30
Boedecker & Ball:	
Principal	19.80
Interest	8.06
Int. from 6-15-14	3.55
Total	31.41
Attorney's fee	3 14
T. J. Brown:	
Principal	8.25
Interest	3.15
Int. from 6-15-14	1.45
Total	12 85
Attorney's fee	1 28
Cain & Kelley:	
Principal	48 95
Interest	16.92
Int. from 6-15-14	8.33
Total	74 24
Attorney's ree	7 42

Thomas Chism:	
Principal Interest Int. from 6-15-14	19.25 7.48 3.41
Total	30.14
Attorney's fee	3.01
[fol. 62] Tom Durant:	
Principal Interest Int. from 6-15-14	22.00 9.65 4.03
Total	35.65
Attorney's fee	3 56
S. H. Elliott:	
Principal Interest Int. from 6-15-14	46 20 19 32 8 33
Total	73 85
Attorney's fee	7 38
R. M. Evans:	
Principal	19 80 6 34 3 31
Total	29.45
Attorney's fee	2 94
C. J. Fogleman:	
Principal Interest Int. from 6-15-14	19.80 6.67 3.37
Total	29.84
Attorney's fee	2.98

R. L. Hall:		
Principal	19	80
Interest	6	38
Int. from 6-15-14	3	33
Total	29	51
Attorney's fee	2	95
J. R. Hamilton:		
Principal	19	80
Interest	6	.63
Int. from 6-15-14	3	. 50
Total	29	.93
Attorney's fee	2	.99
Haynes & Hogenkamp:		
Principal	26	.40
Interest	10	.58
Int. from 6-15-14	4	.71
Total	41	.69
Attorney's fee	4	16
Hensley & Brumit:		
Principal	69	.30
Interest	.).)	61
Int. from 6-15-14	11	.71
[fol. 63] Total	103	3.62
Attorney's fee	10	.36

Hodges & Payne:		
Principal Interest Int. from 6-15-14	57	20 35 99
Total	265	34
Attorney's fee	26	53
G. W. Jackson:		
Principal Interest Int. from 6-15-14	2	60 89 20
Total		69 06
R. N. Jackson:		
Principal Interest Int. from 6-15-14	15	20 18 82
Total Attorney's fee	69 6	20 92
James & Cardin:		
Principal Interest Int. from 6-15-14		20 31 22
Total	19	73
Attorney's fee	1	97
James & Jamison:		
Principal Interest Int. from 6-15-14	99 32 16	07
Total	147	78
Attorney's fee	14	

J. E. Kelley:	
Principal	9.90
Interest	4.17
Int. from 6-15-14	1.79
Total	15.86
Attorney's fee	1.58
Kimble & Co.:	
Principal	3.30
Interest	1.29
Int. from 6-15-14	.58
Total	5.17
Attorney's fee	.51
[fol. 64] King Bros.:	
Principal	6.60
Interest	2.02
Int. from 6-15-14	1.09
Total	9.71
Attorney's fee	.07
Lance & Charley:	
Principal	33.00
Interest	10.80
Int. from 6-15-14	5.58
Total	49_38
Attorney's fee	4 93
Murrell & Clary:	
Principal	21.45
Interest	9.29
Int. from 6-15-14	3.92
Total	34.66
Attorney's fee	3.46

W. L. Payne & Son:		
Principal	245	30
Interest	78	91
Int. from 6-15-14	41	00
Total	365	54
Attorney's fee	36	55
J. J. Pickens:		
Principal	6	60
Interest	2	13
Int. from 6-15-14	1	11
Total	9	84
Attorney's fee		98
F. B. Severs:		
Principal	)	20
Interest	11	35
Int. from 6-15-14	.)	92
Total	52	47
Attorney's fee	.)	24
T. J. Smith:		
Principal		90
Interest	21	98
Int. from 6-15-14	9	67
Total	85	55)
Attorney's fee	8	88
Cal Stewart:		
Principal	(30)	00
Interest		58
Int. from 6-15-14	- 6	16
[fol. 65] Total	53	74
Attorney's fee	ő	37

R. W. Stubblefield:		
Principal	19	80
Interest	6	49
Int. from 6-15-14	3	35
Total	29	64
Attorney's fee	2	96
Three Circle Ranch:		
Principal	26	40
Interest	11	
Int. from 6-15-14	4	79
Total	42	41
Attorney's fee	4	24
N. T. Trout:		
Principal	14	30
Interest	4	65
Int. from 6-15-14	2	41
Total	21	36
Attorney's fee	2	13
Frank Vincent:		
Principal	42	90
Interest	14	
Int. from 6-15-14	7.	26
Total	64	21
Attorney's fee	6	42
Wall & McFish:		
Principal	46	20
Interest	15	32
Int. from 6-15-14	8.	15
Total	69	67
Attorney's fee	6	96

O. G. Warren:	
Principal Interest Int. from 6-15-14	 61 60 25 07 11 06
Total	 97.73
Attorney's fee	 9.77
H. Willis:	
Principal Interest Int. from 6-15-14	 26.40 8.53 4.45
Total	39.38
[fol. 66] W. D. Woods:	
Principal Interest Int. from 6-15-14	 19 80 6 50 3 35
Total	 29 65
Attorney's fee	 2 96
J. A. Wynne:	
Principal Interest Int. from 6-15-14	 46 20 14 89 7 78
Total	68 87
Attorney's fee	 6 88
Yohoko Farm & Stock Co.:	
Principal Interest Int. from 6-15-14	 13.75 4.40 2.30
Total	 20.45
Attorney's fee	 2.04

E. B. Spiller as assignee of the following shippers named in said report Appendix A, said assignments having been made to said Spiller after said report and order of said Commission was made, namely:

Brown & Biggerstaff:		
Principal	30.	25
Interest	11.	84
Int. from 6-15-14	5	36
Total	47	45
Attorney's fee	4	74
T. L. Burnett:		
Principal	84	70
Interest	30	48
Int. from 6-15-14	14	68
Total	129	86
Attorney's fee	12	98
P. R. Clark:		
Principal	13	20
Interest	4	.20
Int. from 6-15-14	2	20
Total	19	. 60
Attorney's fee	1	.96
Mrs. H. M. King:		
Principal	447	.70
Interest	144	27
Int. from 6-15-14	75	.47
Total	557	.44
Attorney's fee	66	.74

#### [fol. 67] Wm. Watson:

Principal											171	.60	
Interest											57	58	
Int. from 6-15-14					,						29	21	
Total											258	39	
Attorney's fee	,										25	83	

being a total for which said E. B. Spiller as assignee of said shippers, namely, Brown & Biggerstaff, T. L. Burnett, P. R. Clark, Mrs. H. M. King and William Watson is entitled to recover of said St. Louis & San Francisco Railroad Company of \$995.82, the amount of principal and interest ordered by the Interstate Commerce Commission to be paid by St. Louis & San Francisco Railroad Company to said shippers and assignors on or before June 15, 1914, and the further sum of \$126.99, being the interest at six per cent per annum on said sum of \$995.82 from June 15, 1914 to August 1, 1916, being a total of \$1,112.81 together with interest thereon from August 1, 1916 at six per cent per annum until paid and the further sum of \$111.28 as attorney's fees, taxed as costs, and other costs.

3. That the damages so claimed grew out of the fact that in the year 1903 the defendant St. Louis & San Francisco Railroad Company and other railway companies defendants in said cause No. 732, and their connecting carriers, being engaged in the business of transporting cattle and other freight from said points of origin mentioned in said Appendix A, to the markets of destination as shown in said Appendix A, on or about March, 1903, advanced the rates for transporting cattle from said points of origin stated in said Appendix A and from other points, to Kansas City, St. Joseph and St. Louis, Missouri, National Stock Yards and Chicago, Illinois, New Orleans, Louisiana, and other points, the amount of the advancements applicable to shipments therein specified being the difference between the rates shown in the column of Appendix A marked "Rate paid" and the column marked "Rate ordered" which rate paid named in said Appendix A the shippers named as consignors in said list were compelled to pay to the defendant,

St. Louis & San Francisco Railroad Company, on the shipments which they, repectively, made as therein shown, which advanced rates were found by the said Interstate Commerce Commission to be unjust and unreasonable and on account of the payment of which on the said shipments said St. Louis & San Francisco Railroad Company was ordered and directed to pay the said principal sum and interest to the intervening petitioner as assignee of said [fol. 68] shippers named as consignors, as shown in said report and order of the Commission, said Exhibit A hereto.

4. That after said rates were advanced and on February 10, 1904, the Cattle Raisers Association of Texas, a voluntary organization of live stock producers and shippers of Texas, Oklahoma and New Mexico, brought its complaint before the Interstate Commerce Commission against the said carrier and other carriers and their connecting lines of railway which had established said rates, alleging that said advanced rates were unjust and unreasonable, and the Commission, after full hearing of said complaint, in accordance with the Act to regulate commerce on August 16, 1905, by its report and opinion in cause No. 732, Cattle Raisers Association of Texas, et al. vs. Missouri, Kansas & Texas Railway Company, et al. reported in 11 I. C. C. 298, found it to be a fact that said advanced rates were unjust and unreasonable and in violation of Secti-n 1 of the Act to regulate commerce, and therefore unlawful as shown by the report of the Commission in said cause last above referred to, which report and opinion as published by the Interstate Commerce Commission is hereby referred to, and this intervener asks that it be considered a part hereof. That said advanced rates, notwithstanding the said decision of the Commission, remained in effect until November 17, 1908. That while the Commission found as shown in its said report and opinion, that the said rates on cattle were ad vanced as aforesaid, and the advances thereof were unjust and unreasonable, no formal order was made by the Commission consequent upon its said report and opinion, be cause the complainant in that case, the Cattle Raisers Asso. ciation, upon the promulgation of that report and opinion, made application to the Commission for more specific findings of fact, which application had not been decided or disposed of, but held under advisement by the Commission until the Act to Regulate Commerce was amended by what is known as the Hepburn Law, effective August 28, 1906, and which application for more specific findings of fact was still pending before the Commission on August 29, 1906.

5. That on August 29, 1906, the said complainant, the Cattle Raisers Association of Texas, in behalf of itself and its members and others similarly situated, who were engaged in the business of raising, buying and shipping cattle from the States of Texas, Oklahoma, New Mexico and Colorado, over said lines of railway, to the markets shown as points of destination in said Appendix A hereinbefore referred to [fol. 69] filed its petition with the Interstate Commerce Commission reaffirming its previous allegations of its peti tion filed with the Commission February 1, 1904, charging that the rates on cattle from the points hereinbefore men tioned to the destinations mentioned, and the advances in said rates, and the rates as aforesaid were unjust and un reasonable, and praying that the Commission should proceed with such further hearing as it might deem necessary with respect to the allegations that said rates were unjust and unreasonable, and for an order of the Interstate Com merce Commission prescribing the just and reasonable rates and praying for an order of reparation against the defendants, respectively, on behalf of the members of the Cattle Raisers Association of Texas, as shippers, and others similarly situated, for their respective damages accruing by reason of the payment of said unjust and unreasonable rates.

That thereupon the Interstate Commerce Commission, after answers duly filed by all the said defendants therein and their connecting carriers, proceeded to a full hearing of the matters contained in said petition, and after such full hearing as provided by law, the Interstate Commerce Commission on April 14, 1908, by its report and opinion, 13 I. C. C. 419, in said cause, found that said rates as advanced and the advances of said rates were unjust and unreasonable, as found in the previous opinion of the Commission as above referred to, reported in 11 I. C. C. 298, the finding of the Commission in its said report of April 14, 1908, being in part as follows:

"It is our opinion, therefore, that the advances shown in the appendix to our former report which were effected by the defendants during the year 1903, were unjust and unreasonable; that the present rates produced by those advances are unjust and unreasonable; that the rates in effect previous to said advances would be just as reasonable and ought not to be exceeded for the future."

The report and opinion of the Interstate Commerce Commission as shown by the official report in said cause, 13 I. C. C. 419, is here referred to and the intervening petitioners ask that the same be taken as a part hereof. That in said report and opinion the Commission reserved for further consideration the matter of reparation when the specific claims thereafter should be presented.

That the Commission in its said last named report, and by supplemental order in said cause, prescribed and fixed [fol. 70] the reasonable rates for shipments of cattle from the points of origin named in said Appendix A hereinbefore referred to, to the destination therein named, being the same rates designated therein as "Rate ordered," which became effective November 17, 1908.

6. That the said parties named as consignors in said Appendix A above referred to, being the owners thereof, shipped the carloads of cattle as therein shown in said Appendix A, from the points of origin to the destinations shown in said Appendix A and paid to the defendant, St. Louis & San Francisco Railroad Company the rate of freight named in column marked "Rate paid," which rates as aforesaid were held by the Commission to be unjust, unreasonable and unlawful at the dates of said shipments, in the amounts as named in said Appendix A and that said owners as shippers and consignors were thereby damaged by defendant, in the amount of the unjust and unreasonable part of the rates as shown by the difference between "Rate paid" and "Rate ordered," as shown in Appendix A. The rate paid was as aforesaid found by the Commission to be unjust and unreasonable and the rate ordered was found to be the just and reasonable rate applicable to such shipments, when made.

- 7. And the intervening petitioners allege that the facts as found by said Commission in said report and opinion were true and correct. That said shippers named in said Appendix A as consignors, and E. B. Spiller as Secretary of the Cattle Raisers Association of Texas, and his predecessor in office, H. E. Crowley, in due time and in accordance with law, filed and caused to be filed with the Interstate Commerce Commission for and on account of the shippers named as consignors, and on account of said Spiller and Crowley as assignees for and on account of said shipment and freight paid, their petitions and claims for reparation for the amount of said unlawful charge which the Commission by its said report and order of January 12, 1914, Exhibit A hereto directed the defendant to pay. That certain of the said claims and rights of the said owners as shippers and consignors as aforesaid, the names and amounts being heretofore stated herein were duly and legally assigned to E. B. Spiller, so that he and said other interveners herein became and now are, the legal and equitable owners and holders thereof and entitled to have and recover the damages resulting to said shippers by reason of the premises, and as such were entitled to have the order of the Interstate Commerce Commission as aforesaid order-[fol. 71] ing and directing said carriers in said cause to pay said principal and interest together with interest thereon, and were entitled to recover the same together with interest and attorneys fees as provided by law.
- 8. That the said order of the Interstate Commerce Commission, Exhibit Λ hereof, directing the railroad therein named to pay the aforesaid damages as therein shown, was duly served upon each of the railway companies defendants therein, including St. Louis & San Francisco Railroad Company; but, though often requested, the said defendant, St. Louis & San Francisco Railroad Company failed and refused and still fails and refuses to pay the same or any part thereof, and is therefore liable to the intervening petitioners in the full amount of said damages, principal, interest and attorneys' fees.
- That thereafter and within one year from January 12,
   the date when said Interstate Commerce Commission

ordered said defendant, St. Louis & San Francisco Railroad Company to pay to the intervening petitioners said sum of money as aforesaid, the intervening petitioners filed their petition in the District Court of the United States for the Western Division of the Western District of Missouri. against the said defendant, St. Louis & San Francisco Railroad Company and other railway carriers, numbered 4320 on the docket of said District Court, setting up the facts as aforesaid and of the order of said Interstate Commerce Commission requiring said defendant to pay to the intervening petitioners said sum of money and praying citation in due form against said defendant and on final hearing a judgment for the aforesaid damages, interest, costs and attornevs' fees. That thereafter the said defendant, St. Louis & San Francisco Railroad Company, having been duly served with summons, duly entered its appearance in said cause and said cause coming on thereafter to be heard upon the issues made by the pleadings therein, was tried and determined in said Court, a jury being waived by agreement and the facts found by the court as alleged on the 16th day of August, 1916 judgment was rendered by said court in favor of your intervening petitioners against said St. Louis & San Francisco Railroad Company for the sum aforesaid together with interest thereon from August 1, 1916 at six per cent per annum until paid and the further sums as aforesaid as attorneys' fees for prosecuting said action, which the said court found to be reasonable and which attorneys fees said court found to be reasonable and which attorneys' fees [fol. 72] A true and verified copy of that portion of said judgment referring to said St. Louis & San Francisco Railroad Company being hereto attached and marked Exhibit "B" and made a part hereof. That no part of said judgment has been paid. That thereupon an agreement was made by and between the plaintiffs and said defendants that said judgment should remain in statu quo and abide the decision of case No. 4308 in which E. B. Spiller was plaintiff and said St. Louis & San Francisco Railroad Company and other carriers were defendants, which case No. 4308 was taken on writ of error by said defendants and each of them from the said United States District Court to the United States Circuit Court of Appeals for the Eighth Circuit, which thereafter on, to-wit, March 11, 1918, reversed the judgment of said District Court and remanded said cause to said District Court for a new trial; that thereafter in due time the same cause No. 4308 was taken by E. B. Spiller by writ of certiorari to the Supreme Court of the United States, where on the 17th day of May, 1920, the Supreme Court of the United States reversed the judgment of said Circuit Court of Appeals of said Eighth Circuit and affirmed the judgment of said District Court of the United States for the Western Division of the Western District of Missouri, with costs and remanded said cause to said District Court, and that by virtue of the agreement entered into as aforesaid, the said judgment in cause No. 4320 entered by said District Court became final.

10. Your intervening petitioners further show to the court that subsequent to the collection of said excess charges by the said St. Louis & San Francisco Railroad Company, there was at all times in its treasury down to the date of the appointment of Thomas H. West and Benjamin L. Winchell as receivers thereof, an amount of money equal to or in excess of the aggregate of the sums so collected in excess of the reasonable amount of said freights; that the gross receipt of said St. Louis & San Francisco Railroad Company from the time of the collection of said excess charges down to the appointment of said receiver, were in excess of its actual operating expenses, and since the appointment of said receiver the gross receipts have continuously been in excess of its actual operating expenses; that since the collection of said excess charges the said St. Louis & San Francisco Railroad Company has paid large sums in excess thereof, by way of interest on its mortgage indebtedness, and has expended for betterment and improvement large sums greatly in excess of said excess charges; that when said receivers were appointed they received from the St. Louis & San Francisco Railroad Company, as shown [fol. 73] by their inventory filed herein, in cash, over \$300,-000,00; that eliminating all items except current receipts and current expenses, the earnings of said St. Louis & San Francisco Railroad Company, from the time said excess charges were collected down to the appointment of said receiver were largely in excess of its operating expenses; that the money so paid by said shippers in excess of the

reasonable and legal rate as fixed by said Interstate Commerce Commission was an illegal exaction and said money belonged to the shippers after the payment thereof the same as it did before such payment; that it was a part of the money in the treasury of the defendant company which passed to the receivers; that said money was not in any way subject to any liens of the mortgages or other instruments of writing executed by the defendant, St. Louis & San Francisco Railroad Company, and that by reason of the premises your intervening petitioners have a claim prior in lien and superior in equity to the liens and claims of any and all of the bondholders, trustees and mortgagees and other claimants holding claims or demands against said St. Louis & San Francisco Railroad Company; that it became and was the duty of said defendant railroad company and of its receivers and of the St. Louis & Sar Francisco Railway Company to repay to the intervening petitioner the amount of said judgment, interest and costs.

11. That it is provided in and by Article Ninth of the final decree heretofore entered in this cause that the purchaser of any of the property described in Article 26 or Article 27 of said decree and his and their successors and assigns shall as part of the consideration for any and all of the purchase price of the property purchased, and in addition to the sums bid by them and elsewhere in said decree required to be paid by him or them, take such property and transfer thereof, upon the express condition that he and receive the deeds or other instruments of conveyance and transfer thereof, upon the express condition that he and they, or his and their successors or assigns shall pay, satisfy and discharge:

"B. Any unpaid claim or creditors of the defendant railroad company which have been or shall be admitted by the parties in interest or adjudged by this court to be prior in lien or superior in equity to the refunding mortgage or the general lien mortgage."

It is further provided in and by the last paragraph of said Article 9 of the final decree, that:

"In the event any purchaser, or successor or assigns, after demand made, shall refuse to pay any of the above

[fol. 74] mentioned indebtedness or liabilities which under the foregoing provision of this Article Ninth he is or may be required to pay, the person holding the claim, therefor, upon twenty days notice to such purchaser, his successors or assigns, may file a petition in this court to have such claim enforced against the property sold to such purchaser in accordance with the usual practice of this court in relation to payments of a similar character."

It is further provided by said final decree, that: "All questions not hereby disposed of are reserved for future adjudication," and by its further order made on the 29th day of January, 1918, the court further reserved unto itself jurisdiction in this cause for the purpose of determining questions and rights that may thereafter be presented to it. The intervenors state that their claim and judgment as aforesaid is prior in lien and superior in equity to the refunding mortgages and to the general lien mortgages, by reason of the facts stated aforesaid; that the St. Louis & San Francisco Railway Company is the purchaser of the properties of the St. Louis & San Francisco Railroad Company sold under the decree of this court in these cases, and that it thereby acquired all money in the hands of the receivers not otherwise used and disposed of, in accordance with the order of this court. That the intervenors duly demanded of the said St. Louis & San Francisco Railway Company, payment of said judgment, interest and costs, after the same had been made final by the decision and mandate of the United States Supreme Court, which payment the said St. Louis & San Francisco Railway Company, purchaser as aforesaid, refused to pay. That intervenors heretofore on the 2nd day of December, 1920, gave to said St. Louis & San Francisco Railway Company, as such purchaser, twenty days' notice of its intention to file this petition in this court to have such claim enforced against the property sold to it in accordance with the usual practice of this court in relation to payments of a similar character.

12. Intervenors further state, that the St. Louis & San Francisco Railroad Company, the receivers thereof, all of the parties to this cause, and the said St. Louis & San Francisco Railway Company as purchaser of said property had full knowledge and notice prior to the sale of said property

under the order of this court and prior to the confirmation of said sale that these intervenors had such claims and that they were being prosecuted in the courts of this circuit and in the Supreme Court of the United States, and that intervenors' claims were prior in lien and superior in equity to [fol. 75] the liens of said refunding bonds and of said genagainst the defendant railroad company's property. That eral mortgage lien bonds and all other liens and claims these intervenors and their attorneys had no knowledge or notice whatever of the order of this court requiring persons having any claims or demands against the said railroad company to present and file their claims herein within the time therein fixed, or at any time; that they had no knowledge or notice whatever of the final decree entered herein at the time the same was so entered or at the time the said railroad properties were sold under said decree: that the first knowledge and notice that the intervenors and their attornevs, or any of them, had of said order of this court requiring the presentation of claims and of the final decree herein, was in August, 1916, at the time of the presentation to this court of certain objections to the confirmation of the sale, at which hearing at St. Louis, Missouri, the intervenors' attornevs were present and they then and there gave notice to the attorneys for the Reorganization Committee and for the purchasers of said railroad, and for the said railway company and the said railroad company, and the attorneys for the said Guaranty Trust Company and Bankers Prust Company, and all other parties to said cause, that the United States District Court for the Western Division of the Western District of Missouri, had given judgment on August 16, 1916, in intervenors' favor against the said railroad company for the amount as set forth above, and that intervenors would claim the same as prior in lien and superior in equity to the lien and claim of all of the other persons whomsoever against the property of the said railway company; that when those intervenors and their attorneys first learned of said order made by this court requiring all persons having any claims or demands to present the same on or before the 1st day of February, 1916, said time had expired; that intervenors were prosecuting their claims in the United States District Court for the Western Division of the Western District of Missouri because they were required so to do by Section 16 of the Interstate Commerce Act, which provides:

"If the carrier does not comply with an order for the payment of money within the time limited in such order, the complainant, or any person for whose benefit such order was made, may file in the Circuit Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the par[fol. 76] ties, a petition setting forth briefly the causes for which he claims the damages and the order of the Commission in the premises."

The railroad companies having failed to pay the amount ordered by the Interstate Commerce Commission on January 12, 1914, the only remedy intervenors had was to follow the remedy prescribed by the Act of Congress as set forth in said Section 16. The order of the Commission was dated January 12, 1914, which was duly served upon the said defendant railroad company and service thereof acknowledged by it in subsequent proceedings based upon said order. prosecuted in the United States District Court for the Western Division of the Western District of Missonri. The rec-ivers were appointed by the order of this Court in May, 1913, and they immediately took charge of said railroad property and of all litigation to which said railroad was a party. The attorneys of said receivers were the same attorneys who had acted for said railroad company before the Interstate Commerce Commission in the said proceedings and continued to act as such until said order was made by said Interstate Commerce Commission. Said same attorneys also appeared and vigorously contested the claim of intervenors in case No. 4320 in the United States Distriet Court for the Western Division of the Western District of Missouri, brought by intervenors against said railroad company and other carriers to enforce the order of said Interstate Commerce Commission. Said same attornevs acted for defendant in stipulating with intervenors that the judgment of said United States District Court at Kansas City in said case No. 4320 should abide the result of

a similar case, No. 4308, taken by said railroad company by writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, where said attorneys appeared and vigorously contested the judgment of said United States District Court, and also appeared and contested said claim in the United States Supreme Court; that said railroad company gave bond for the costs that accrued upon its appeal from the judgment of the United States District Court to the United States Circuit Court of Appeals, and afterwards, recognizing its liability upon the bond and in order to protect its surety on said bond for costs, the defendant St. Louis & San Francisco Railway Company has paid to the intervenors a part of the costs therein unpaid and for which its bondsmen would be liable.

The appointment of the receivers made on the petition of the bondholders was May 22, 1914, so that said receivers were in full charge of defendant railroad company's prop-[fol. 77] erty at the time intervenors commenced suit against the railroad company and other railroad companies. to recover upon the orders made by the Interstate Commerce Commission. Said suits were first commenced at Fort Worth, in the State of Texas, which were afterwards dismissed because all of the railroad companies, including the St. Louis & San Francisco Railroad Company, objected to the jurisdiction, claiming a right to be sued in the district where their principal offices were located or in some district where the railroads operate. To avoid the question of jurisdiction, therefore, said suit was commenced by intervenors at Kansas City, in the United States District Court for the Western District of Missouri, against all of the carriers affected by said proceedings, and at the same time a separate suit was commenced in this court in this division against the said St. Louis & San Francisco Railroad Company and process served upon said railroad company, of which the said receivers had full notice and knowledge, which last named suit was afterwards dismissed after judgment had been rendered in the joint suit brought at Kansas City. That service of process in said case at Kansas City was first had upon the agents of said receivers and the defendant railroad company made a special appe-rance therein and objected to said service. Whereupon further service was had upon said railroad company. It was due entirely to protracted litigation and determined efforts upon the part of the railroad company and of the said receivers and of the said purchaser of the railway company after the purchase of said railroad by it, to defeat the rights of the intervenors and to have the courts decide that intervenors had no claim of any kind against the railroad company, that said claim was not reduced to judgment in ample time for intervenors to have intervened in this cause and presented their demand against the said railroad company

within the time ordered by the court.

Intervenors further state that the principal object of said order was to give notice to all persons dealing with the property and to advise the court of the fact that such claim did exist and that object was fully obtained by the actual notice and knowledge on the part of the railroad company, of the receivers appointed by this court, and of all of the parties to this consolidated suit, and the attorneys, of the fact that such claim existed and was being prosecuted vigorously as possible in the courts of this circuit and of the United States Supreme Court. These intervenors, in August, 1916, at the time of the argument of the objections to the confirmation of the sale made by the Master, gave [fol. 78] personal and written notice to Henry W. Taft and the other attorneys representing the Reorganization Committee, and the purchase of the property the sale of which was then asked to be confirmed; that said notice was given to them in the court room of the Honorable Walter H. Sanborn, Judge, presiding, where he was at time sitting in St. Louis, Missouri, of all the facts under which the judgment had been rendered by the said United States District Court at Kansas City and that appeal had been taken, and that said cause was then pending in the United States District Court of Appeals.

Intervenors further state that no offer of any kind has ever been made by any of the parties to this cause, either the defendant railroad company or the purchaser, the railway company, of any of the mortgage bondholders or others, to make any payment of these claims of the intervenors, of any kind and nature, or to make any settlement whatsoever with the intervenors on account thereof; so that the intervenors say that said Railway Company, said Rail-

road Company, said trustees and mortgage bondholders and stockholders have each and all had full knowledge and notice of the pendency of the intervenors' claim and demand and of the nature thereof.

Wherefore, the premises considered, intervenors respectfully ask this court to make an order permitting them to file this intervening petition, to order that it be referred to a Master in Chancery, that upon a hearing it be ordered, adjudged and decreed by the court that these intervenors have a just demand for the amount of said judgment, to-wit. (\$3,652.97) three thousand six hundred fifty-two and 97/100 Dollars, with interest thereon from August 1, 1916 at six per cent per annum and \$365.29 attys.' fees taxed as costs: that it is a just demand, prior in lien and superior in equity to the refunding mortgage and the general lien mortgage of the St. Louis & San Francisco Railroad Company, and that unless paid such claim be enforced against the property sold to the St. Louis & San Francisco Railway Company under the final decree of the court entered in this cause, in accordance with the -sual practice of this court in relation to payments of a similar character.

S. H. Cowan, B. F. Deatherage, Solicitors & Attorneys for Intervenors.

[fol. 79] Duly sworn to by B. F. Deatherage. Jurat omitted in printing.

Exhibit "A" omitted here as same is identical with Exhibit A attached to Intervening Petition of E. B. Spiller heretofore set out.

EXHIBIT B TO INTERVENING PETITION OF E. B. SPHLER ET AL.

No. 4320

E. B. Spiller and Others, Plaintiffs,

VS.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY and Others, Defendants

#### Judgment

Now on this day this cause coming on regularly to be heard and considered, all of the parties plaintiffs and defendants, by their respective attorneys, having heretofore appeared and having by written stipulation herein waived a jury and submitted this cause to the Court and all of the evidence having been heretofore introduced, seen and heard by the Court, and briefs of counsel having been submitted, seen and read by the Court and oral arguments of counsel having been duly heard by the Court, the Court now being fully advised in the premises, finds all of the issues made by the pleadings both of law and fact in favor of the plaintiffs and finds the facts to be as stated in the first count of plaintiff's petition herein.

[fol. 80] Wherefore it is considered ordered, adjudged and decreed by the Court, that the plaintiff E. B. Spiller, as assignee of the following named persons as consignors, namely, Brown and Biggerstaff, T. L. Burnett, P. R. Clark, Mrs. H. M. King and William Watson, do have and recover of and from defendant St. Louis San Francisco Railroad Company the sum of Nine Hundred Ninety-five and 82/100 Dollars (\$995.82) being the amount of principal and interest ordered by the Interstate Commerce Commission to be paid to the said above named consignors by said St. Louis & San Francisco Railroad Company on or before June 15th, 1914, which has since that time been assigned to the plaintiff E. B. Spiller; and do have and recover the furth sum of One Hundred Twenty-six and 99/100 Dollars (126.99) being the interest at six per cent per annum on said sum of \$995.82 from June 15th, 1914 to August 1, 1916, being a total sum of Eleven Hundred Twelve and 81/100 Dollars together with interest thereon from August 1st, 1916, at six per cent

per annum until paid, and that the said E. B. Spiller have and recover of and from the said St. Louis and San Francisco Railroad Company as such assignee, the further sum of One Hundred Eleven and 28/100 Dollars (111.28) as attorneys fees for prosecuting this action, which sum the Coart finds to be reasonable, which attorneys fees shall be taxed as costs herein; and that the said plaintiff E. B. Spiller have and recover of the said St. Louis & San Francisco Railroad Company his costs laid out and expended, for all of which let execution issue.

And it is further ordered, adjudged and decreed by the Court that each of the following named plaintiffs do have and recover of and from the said St. Louis & San Francisco Railroad Company the sums of money set opposite their respective names, being the amount of principal and interest ordered by the Interstate Commerce Commission to be paid to each of the said plaintiffs, respectively, by the said St. Louis & San Francisco Railroad Company on or before June 15, 1914, and that each of said plaintiffs do have and recover the further sums set opposite their respective names, being the interest at six per cent per annum from June 15, 1914 to August 1, 1916, on the amount ordered by the said Interstate Commerce Commission to be paid to plaintiffs, respectively, and being a total sum in favor of each of the plaintiffs hereinafter named set opposite their respective names, together with interest thereon from August 1, 1916, at six yes cent per annum until paid; and that each of the said plaintiffs do have and re-[fol. 81] cover of and from said St. Louis & San Francisco Railroad Company the further sum set opposite their respective names as attorneys fees for prosecuting this action, which sum the Court finds to be reasonable as attorneys fees and which attorneys fees shall be taxed as costs herein; and that each of the said plaintiffs also have and recover of said St. Louis & San Franci-co Railroad Company their costs, respectively, herein laid out and expended, for all of which let execution issue in favor of each of them. names of said plaintiffs and the amounts adjudged in favor of each of them against said St. Louis & San Francisco Railroad Company being shown in the following list; the first column the name of each plaintiff; opposite in the second column, the principal; in the third column, interest

thereon ordered by the Interstate Commerce Commission to be paid to each plaintiff; the fourth column, the interest on the amount so ordered by the Interstate Commerce Commission to be paid from June 15, 1914; the fifth column the total amount hereby adjudged in favor of each plaintiff against the St. Louis and San Francisco Railway Company; in the sixth column the 10 per cent attorneys fees adjudged in favor of such plaintiff against the said defendant.

V			Attivis		
Name	Principal	Interest	6-15-14	Total 10%	fee
Bailey & Townsend	. 22.00	8.60	3.90		
Baker & Brown	. 13.20	4.26	9.99	34.50	3.45
W. M. Barringer	. 13.20	4.48		19.63	1.96
Battles & Denton	. 125,40	39.97	$\frac{2.25}{21.08}$	19.63	1.99
G. W. Battles	. 33.00	12.85	5.88	186,45	18.64
F. N. Belshe	15.40	5.05	2.60	51.69	5, 16
Boedecker & Ball	19.80	8.06	3.55	23,05	2.30
T. J. Brown	8.25	3.15		31.41	3.14
Cain & Keller	48.95	16.92	1.45 8.33	12.85	1.28
Thomas Chism	19.25	7.48	3.41	71.21	7 . 12
Tom Durant	22,00	9.65		30.14	3,01
S. H. Elliott	46.20	19.32	4.03	35.65	3 . 706
R. M. Evans	19.80	6.34	8,33	73.85	7.38
C. J. Fogleman	19.80	6.67	3.37	29, 45	2.94
R. L. Hall	19.80	6.38	3.33	29.81	2.98
J. R. Hamilton	19.80	6.63	3.50	29.51	2,95
Hogenkamp Haynes	26.40	10.58	4.71	29,93	2,90
Hensley & Brumit	69.30	22.61	11.71	41.69 103.62	4.16
Hodges & Payne	178.20	57.35	29,99	265.34	10,36
G. W. Jackson	6.60	2.89	1.20	10.69	26,53
R. H. Jackson	46.20	15.16	7.82	69.20	1.06
[fol. 82] James & Cradin	13,20	4.31	9 99	19.73	1.97
James & Jamison	99,00	32.07	16.71	147.78	11.77
J. E. Kelley	9,90	4.17	1.79	15.86	1.58
Kimble & Co	3.30	1.29	.68	5.17	.51
King Brothers	6,60	2.02	1.09	9.71	.07
Lance & Charley	33,00	10.80	5.58	49.38	4.93
Murrell & Clary	21.45	9.29	3.92	34,66	3.46
W. L. Payne & Son	245.30	78.91	41.33	365.54	36.55
J. J. Pickens	6.60	2.13	1.11	9.84	.95
F. B. Severs	35.20	11.35	5.92	52.47	5.21
T. J. Smith	53.90	21.98	9.67	85,55	8.55
Cal Stewart	33.00	14.58	6.16	53.74	
R. W. Stubblefield	19.89	6.49	3.35	29.64	2.96
Three Circle Ranch	26.40	11.22	4.79	42.41	4.24
N. T. Trout	14.30	4.65	2.41	21.36	2.43
Frank Vincent	42.90	14.05	7.26	64.21	6.42
Wall & McFish	46.20	15.32	8.15	69.67	6.96
O. G. Warren	61.60	25.07	11.06	97.73	9.77
H. Willis	26.40	8.53	4.45	39.38	3, 113
W. D. Woods	19.80	6.50	3.35	29.65	2.96
J. A. Wynne	46.20	14.89	7.78	68.87	6.88
Yohoke Farm & Stock Co	13.75	4.40	2.30	20.45	2.04

(Signed) Arba S. Vaavalkenburgh, Judge.

# IN UNITED STATES DISTRICT COURT

Order Granting Leave to E. B. Spiller to File Separate and Supplemental Intervening Petition—March 10, 1921

Upon consideration of the application of E. B. Spiller, for leave to file herein a separate and supplemental intervening petition, which application was this day filed, and after hearing arguments of Walter H. Saunders, Esq., appearing on behalf of intervenor, and of Edward T. Miller, Esq., appearing on behalf of respondents, it is now

Ordered that said application be granted; that the applicant have leave to file said supplemental intervening petition; that the St. Louis-San Francisco Railway Company answer said petition or take such other action against it as it may be advised within twenty days after service of this order upon it-attorneys, and that the issues raised by the said intervention be and they are hereby referred to the [fol. 83] Special Master for hearing, consideration and report of the facts and his conclusions.

(Signed) Walter H. Sanborn, Senior Circuit Judge.

# IN UNITED STATES DISTRICT COURT

SEPARATE AND SUPPLEMENTAL INTERVENING PETITION OF E. B. SPILLER—Filed March 10, 1921

## [Title omitted]

Comes now your petitioner, E. B. Spiller, and shows to your Honor that his claim in his petition of intervention, heretofore filed herein, insofar as the same relates to attorneys' fees adjudged in his favor by the District Court of the United States for the Western Division of the Western District of Missouri, and taxed as costs in cause No. 4308 in said District Court, rests upon the additional and further grounds for allowance as a preferential claim, and to payment thereof by the receivers as hereinafter stated; that your petitioner refers to his said petition of interven-[fol. 84] tion heretofore filed in this cause and prays that the same be made and considered a part hereof with the same

effect and force as if all the facts therein stated were set out herein.

That upon the appointment of the receivers herein, they were, by order of this court then made and others thereafter made as appear of record in this cause, directed and ordered to prosecute and defend all suits at law or in equity against the defendant St. Louis & San Francisco Railroad Company; that as appears from the allegations in your petitioner's intervening petition heretofore filed herein. said above mentioned cause No. 4308 was pending in the District Court of the United States for the Western Division of the Western District of Missouri after the receivers herein were appointed; that by the direction of the receivers herein counsel for the receivers appeared in said cause and conducted the defense of said cause on behalf of the defendant St. Louis & San Francisco Railroad Company and continued to defend the same, taking an appeal from the judgment of the said District Court of the United States for the Western Division of the Western District of Missouri to the Circuit Court of Appeals of the Eighth Circuit and defendant said cause in the Supreme Court of the United States, to which Court said cause was carried by your intervening petitioner on a writ of certiorari; that when said cause No. 4308 was appealed to said United States Court of Appeals for the Eighth Circuit, the receivers herein obtained and caused to be filed in said cause a cost bond, conditioned among other things, that the defend- St. Louis & San Francisco Railroad Company, would answer all costs if it failed to make good its appeal; that said bond was in the penal sum of Thirty-five Hundred (\$3500.00) Dollars; that in obtaining said bond the receivers herein indemnified the surety company signing and executing the same as surety against loss by reason of having executed said bond; that the amount of attorneys' fees adjudged by the court to your intervening petitioner and taxed as costs in said cause No. 4308 was Four Thousand Five Hundred and Eighty-six and 32/100 (\$4586.32) Dollars; that to relieve the surety on said cost bond and because of the agreement of indemnity aforesaid, the receivers herein have paid off and discharged the amount of said bond, paying the clerk's costs and the sum of Three Thousand Three Hundred and Fifty-one and 19/100

(\$3351.19) Dollars of the attorneys' fees taxed as costs as aforesaid, leaving a balance of said costs unpaid of Twelve Hundred Thirty-five and 13/100 (\$1235.13) Dollars, which [fol. 85] amount is due and owing to your intervening petitioner; that said attorneys' fees, taxed as costs as aforesaid, and said costs consisting of said attorneys' fees allowed by said District Court, were incurred and made by the action of the receivers pursuant to the orders of this court in defending and litigating said cause No. 4308; that by virtue of all the premises, said railroad company and the receivers herein should be required and ordered to pay the balance of said attorneys' fees taxed as costs as aforesaid.

Wherefore, by reason of the premises and by reason of the facts set forth in your intervening petitioner's original bill of intervention heretofore filed herein, your petitioner prays that the receivers herein be ordered to pay to your petitioner or to the Clerk of the District Court of the United States for the Western Division of the Western District of Missouri for your intervening petitioner said sum of Twelve Hundred Thirty-five and 13/100 (\$1,235.13) Dollars, attorneys' fees so taxed as costs in said cause No. 4308.

(Signed) S. H. Cowan, John S. Leahy, Walter H. Saunders, D. A. Murphy, Solicitors for Intervening Petitioner, E. B. Spiller.

Duly sworn to by D. A. Murphy. Jurat omitted in printing.

[fol. 86] IN UNITED STATES DISTRICT COURT

Order Granting Leave to File Supplemental Intervening Petition of E. B. Spiller et al.—March 10, 1921

Upon consideration of the application of E. B. Spiller, et al. for leave to file herein a supplemental intervening petition, which application was this day filed, and after hearing argument of Walter H. Saunders, Esq., appearing on behalf of interveners, and of Edward T. Miller, Esq., appearing on behalf of respondents, it is now

Ordered that said application be granted; that the applicants have leave to file said supplemental intervening petition; that the St. Louis-San Francisco Railway Company answer said petition or take such other action against it as it may be advised within twenty days after service of this order upon its attorneys, and that the issues raised by the said intervention be and they are hereby referred to the Special Master for hearing, consideration and report of the facts and his conclusions.

(Signed) Walter H. Sanborn, Senior Circuit Judge.

### IN UNITED STATES DISTRICT COURT

## [Title omitted]

Consolidated Cause Final.

SUPPLEMENTAL INTERVENING PETITION OF E. B. SPILLER ET AL.—Filed March 10, 1921

[fol. 87] Come now your petitioners, E. B. Spiller, Bailey & Townsend, Baker & Brown, W. M. Barringer, Battles & Denton, C. W. Battles, F. N. Belshe, Boedecker & Ball, T. J. Brown, Cain & Kelley, Thomas Chism, Tom Durant, S. H. Elliott, R. M. Evans, C. J. Fogleman, R. L. Hall, J. R. Hamilton, Haynes & Hogenkamp, Hensley & Brumit, Hodges & Payne, G. W. Jackson, R. H. Jackson, James & Cardin, James & Jamison, J. E. Kelley, Kimble & Co., King Bros., Lance & Charley, Murrell & Clary, W. L. Payne & Son, J. J. Pickens, F. B. Severs, T. J. Smith, Cal Stewart, R. W. Stubblefield, Three Circle Ranch, N. T. Trout, Frank Vincent, Wall & McFish, O. G. Warren, H. Willis, W. D. Woods, J. A. Wynne, and Yohoko Farm & Stock Company, and show to your Honor that their claim in their petition of intervention, heretofore filed herein, insofar as the same relates to attorneys' fees adjudged in their favor by the District Court of the United States for the Western Division of the Western District of Missouri, and taxed as costs in cause No. 4320 in said District Court, rests upon the additional and further grounds for allowance as a preferential claim and to payment by the receivers herein as hereinafter set forth; that your petitioners refer to said intervening petition heretofore filed by them herein and pray that said intervening petition may be made a part hereof with the same force and effect as if all the facts stated therein were set out in full herein.

That upon the appointment of the receivers herein, the said receivers were by order of this court then made and by orders thereafter made, as appear of record in this cause, directed and ordered to prosecute and defend all suits at law or in equity, brought against the defendant, St. Louis & San Francisco Railroad Company; that as appears from the allegations of your petitioners' intervening petition heretofore filed herein, said cause No. 4320 was brought and pending in the District Court of the United States for the Western Division of the Western District of Missouri [fol. 88] after said receivers herein were appointed; that by direction of the receivers herein counsel for said receivers appeared in said cause and conducted the defense of said cause on behalf of the defendant, St. Louis & San Francisco Railroad Company, and continued to defend the same to judgment; that at the time said cause No. 4320 was pending in said District Court, there was another cause pending in said District Court, entitled E. B. Spiller versus St. Louis & San Francisco Railroad Company, et al., and numbered 4308; that a stipulation was entered into by and between counsel for your interveners and counsel for the receivers herein which provided that the result in said cause No. 4320 should abide the final judgment in said cause No. 4308, and that the same character of judgment should be entered in said cause No. 4320 as was finally entered in said cause No. 4308; that judgment was rendered by the said District Court of the United States for the Western Division of the Western District of Missouri in said cause No. 4308, in favor of the plaintiff, E. B. Spiller; that the defendant in said cause No. 4308, acting through counsel for the receivers herein, appealed from said judgment of the District Court to the Circuit Court of Appeals of the Eighth Circuit, and prosecuted said appeal in said last named court, and defended said cause in the Supreme Court of the United States, to which court said cause was carried by the plaintiff therein, E. B. Spiller, on a writ of

certiorari; that the Supreme Court of the United States, on or about the 17th day of May, 1920, reversed said Circuit Court of Appeals and affirmed the judgment of said District Court in favor of said Spiller; that the amount of the attorneys' fees adjudged by the said District Court to your intervening petitioners, taxed as costs in said cause No. 4320 was Three Hundred Sixty-four and 82 100 (\$364.82) Dollars, no part of which has been paid by the defendant herein or by the receivers herein; that said costs, consisting of attorneys' fees allowed by said court as aforesaid, were incurred and made by said action of the receivers herein in defending and litigating said cause Xo. 4320 and said cause No. 4308, and the amount thereof is now due and owing to your intervening petitioners; that by virtue of all the premises, said railroad company and the receivers, herein should be required and ordered to pay the said attorneys' fees taxes as costs as aforesaid and amounting (as aforesaid to Three Hundred Sixty-four and 82 100 (\$364.82) Dollars.

Wherefore, by reason of the premises, your petitioners pray that the receivers herein be ordered to pay to your [fol. 89] petitioners or to the Clerk of the District Court of the United States for the Western Division of the Western District of Missouri for your petitioners said sum of Three Hundred Sixty-four and 82 100 (\$364.82) Dollars, attorneys' fees so taxed as costs in said cause No. 4320.

S. H. Cowan, John S. Leahy, Walter H. Saunders, D. A. Murphy, Solicitors for Intervening Petitioners, E. B. Spiller et al.

Duly sworn to by D. A. Murphy. Jurat omitted in printing.

# IN UNITED STATES DISTRICT COURT

### [Title omitted]

#### Consolidated Cause Final

In the Matter of the Intervening Petition of E. B. Spiller, Intervening Petition No. 403

Answer of Defendant to Intervening Petition—Filed November 30, 1921

Comes now above-named defendant and by leave of Court, files this, its answer to the intervening petition of E. B. Spiller, and answering, states:

- 1. Defendant pleads in bar of the claim presented by said intervening petition that said claim arose between the [fol. 90] period of August, 1906, to November, 1908, and many years prior to May 27, 1913, the date of the appointment of Receivers in this cause; that by the terms of the Interlocutory Decree made, entered and filed in this cause, all holders of claims against the defendant herein were required to file in this cause on or before the date fixed therefor in said Interlocutory Decree, which date was subsequently extended by orders made and entered herein to February 1, 1916, and not thereafter; that said claim presented by intervener herein was determined and established by the Interstate Commerce Commission long prior to February 1, 1916, yet said claim was not filed herein prior to the date last aforesaid. Railway Company hereby refers to said Interl-netory Decree and to the orders of this Court extending the time for filing claims as aforesaid as a part of the record in cause to the same effect as if the same were fully set forth herein. By reason whereof defendant avers that said intervening petition and the claim presented thereby should be dismissed.
- 2. Defendant further pleading in bar of the claim presented by said intervening petition avers that said claim arose prior to the entry of the Final Decree herein, to which Final Decree defendant hereby refers to the same effect as if the same were made a part hereof; that in and by said

Final Decree and by Articles Ninth and Tenth thereof it was formally adjudicated and decreed that notice had been given for the presentation in this cause of all claims and demands against defendant of every character and description whatsoever, and that the time for the presentation of said claims and demands had expired, and that no claim or demand of the nature of the claim presented by said intervening petition filed herein that had not been presented in this cause pursuant to decrees and orders herein made should be enforceable against the Receivers appointed in this cause or against the property sold or any part or portion thereof, or against any purchaser of the same or any part thereof, his successors or assigns, nor should the holder thereof be entitled to the benefits of Article Ninth of said Final Decree, nor should any such claim or demand not so presented be entitled to share in the distribution of any of the proceeds of sale under said Final Decree. By reason whereof defendant prays that said intervening petition and the claim thereby presented be dismissed.

- 3. Defendant further pleading in bar of the claim presented by said intervening petition avers that on January [fol. 91] 11, 1915, intervener instituted suit in this Court against defendant upon the same claim now presented, to which suit answer was duly filed on April 12, 1915, and reply thereto was filed on April 15, 1915; that said cause was subsequently continued from time to time and on March 19, 1917, was dismissed for want of prosecution; that on March 22, 1917, on intervener's motion said dismissal was vacated and said cause again continued from time to time and was finally dismissed by this Court for want of prosecution on December 6, 1918. Intervener having failed to prosecute said suit and having suffered said suit to be dismissed for want of prosecution is now estopped and precluded from attempting to prosecute his said claim in this cause. By reason whereof said intervening petition and the claim thereby presented should be dismissed.
- 4. Defendant therefore prays by reason of the foregoing that the orders heretofore made in this cause allowing said intervening petition to be filed herein be set aside and for naught held, and that said intervening petition be dismissed.

Defendant, without waiving its pleas in bar hereinbefore stated, and continuing to insist and to rely upon the same in bar of the further prosecution of said intervening petition, answering said intervening petition, states:

First. It admits the allegations of paragraph 1 thereof.

Second. Answering paragraph 2 of said intervening petition it admits that on January 12, 1914, the Interstate Commerce Commission made an order directing defendant and other carriers named in said order to pay to intervener damages resulting from the rates charged by said carriers on the shipments of cattle shown in said order, and that the amount so ordered paid is correctly set forth in said paragraph 2 of said intervening petition; denies that intervener is the lawful assignee in respect of said damages of the consignors referred to in said paragraph 2.

Third. Answering paragraph 3 of said intervening petition it admits the allegations thereof.

Fourth. Answering paragraph 4 of said intervening petition it admits the allegations thereof except the allegation that the advanced rates therein referred to were unlawful or found to be unlawful by the Interstate Commerce Commission, which allegation it denies.

Fifth. Answering paragraph 5 of said intervening petition it admits the allegations thereof.

[fol. 92] Sixth. Answering paragraph 6 of said intervening petition it admits that the matters and things therein stated were made and determined by the said Interstate Commerce Commission as stated in said paragraph, except that it denies that said Commission found said rates to be unlawful.

Seventh. Answering paragraph 7 of said intervening petition it denies that the facts as found by said Interstate Commerce Commission in its said report and opinion were true and correct; denies that the said claims and rights of said owners as shippers and consignors as stated in said paragraph were duly and legally assigned to intervener; denies that intervener was at the date of said order of said

Interstate Commerce Commission and now is the legal and equitable owner and holder of said claims and rights and denies that intervener is entitled to recover the same.

Eighth. Answering paragraph 8 of said intervening petition it admits service upon defendant of said order of said Interstate Commerce Commission and that defendant has failed to pay the same or any part thereof; denies that defendant is liable to intervener for the full amount herein claimed or for any part thereof.

Ninth. Answering paragraph 9 of said intervening petition it admits the allegations of the first section thereof, but answering the last section in said paragraph it denies that it has paid a part of the costs taxed against it in said cause, including \$3,351.00 as part of the attorneys' fees.

Tenth. Answering paragraph 10 of said intervening petition it denies that subsequent to the collection of said charges by defendant there was at all times in its treasury down to the date of the appointment of said Receivers an amount of money equal to or in excess of the aggregate of intervener's claim; denies that the gross receipts of defendant from the time of the collection of said charges to the appointment of said Receivers were in excess of its actual operating expenses, and avers that it is without knowledge that since the appointment of said Receivers the gross receipts have continuously been in excess of defendant's actual operating expenses; admits that since the collection of said charges defendant has paid large sums in excess thereof by way of interest on its mortgage indebtedness and for betterments and improvements; admits that when said Receivers were appointed they received from defendant in cash over \$300,000.00; denies that the earnings of defendant, eliminating all items except current receipts and [fol. 93] current expenses, from the time said charges were collected to the appointment of said Receivers were largely in excess of defendant's operating expenses; denies that the money so paid by said shippers in excess of the reasonable rates as fixed by said Interstate Commerce Commission was an illegal exaction, or that said money belonged to said shippers after payment thereof the same as it did before such payment; denies that it was part of the money in

the treasury of defendant which passed to said Receivers; denies that said money was not in any way subject to any liens of the mortgages or other instruments of writing executed by defendant; denies that intervener has a claim prior in lien or superior in equity to the liens and claims of any and all of the bondholders, trustees and mortgagees, and other claimants, holding claims and demands against defendant; denies that it became and was the duty of defendant and of said Receivers and of defendant to repay to intervener the amount of said judgment, interest and costs.

Eleventh. Answering paragraph 11 of the intervening petition it admits that a portion of Article Ninth of said Final Decree entered in this cause is correctly stated therein, but refers said Final Decree in its entirety to the Court for the correct interpretation thereof; denies that intervener's claim and judgment, or either of them, are prior in lien or superior in equity to the Refunding Mortgages and the General Lien Mortgages referred to in said Final Decree; admits that St. Louis-San Francisco Railway Company is the purchaser of the properties of defendant sold under said Final Decree; avers that it is without knowledge that intervener duly demanded of defendant payment of said judgment, interest and costs after the same had been made final by the Supreme Court of the United States.

Twelfth. Answering paragraph 12 of said intervening petition it denies that it had full knowledge and notice prior to the sale of said property and prior to the confirmation of said sale that intervener had his said claim and was prosecuting the same in court; avers that it is without knowledge that said Receivers had knowledge thereof; denies that defendant had knowledge that intervener's said claim was prior in lien or superior in equity to the liens of said Refunding Bonds, said General Lien Bonds, and all other liens and claims on defendant's property; avers that intervener's claim was not prior in lien or superior in equity to the liens of said Refunding Bonds or of said General Mortgage Lien Bonds, or to any other liens or claims against de-[fol. 94] fendant's property; denies that intervener and his attorneys had no knowledge or notice whatever of the order of this Court requiring persons having any claims or de-

mands against defendant to present and file the same herein within the time therein fixed, or at any time; denies that intervener and his attorneys had no knowledge or notice whatever of the Final Decree herein when the same was entered or at the time of the sale of defendant's property under said decree; denies that the first knowledge and notice that intervener and his attorneys, or either thereof. had of said order of this Court requiring the presentation of claims and of the Final Decree herein was in August. 1916; avers that it is without knowledge that at the hearing upon the confirmation of said sale intervener's attorneys gave notice to the attorneys for the Reorganization Committee and for the purchasers of said railroad of defendant and for St. Louis-San Francisco Railway Company and defendant, and the attorneys for the Guaranty Trust Company and Bankers Trust Company and all other parties to said cause, that the United States District Court for the Western Division of the Western District of Missouri had given judgment on August 10, 1916, in intervener's favor against defendant for the amount set forth in the intervening petition, and that intervener would file the same as prior in lien and superior in equity of the lien and claim of all other persons whomsoever against the property of defendant; denies that when intervener and his attorneys first learned of said order requiring the presentation of claims against defendant on or before February 1. 1916, said time had expired; admits that intervener was prosecuting his claim in said United States District Court, but avers that intervener had full opportunity to file but failed to file said claim in this Court in this cause as required by said orders and decrees of this Court; denies that the only remedy intervener had was that prescribed by the Act of Congress as set forth in Section 16 of the Interstate Commerce Act; admits that said Receivers were appointed as such in May, 1913; denies that defendant by its attorneys, who were the same attorneys who acted for and in behalf of the Receivers of defendant, appeared in said cause in said United States District Court for the Western Division of the Western District of Missouri and acted for defendant and took an appeal from the judgment of said Court to the United States Circuit Court of Appeals for the Eighth Circuit and there contested said decision in said

District Court, and also appeared and there contested said decision in the United States Supreme Court; admits that a portion of the cost in said litigation, secured by defend-[fol. 95] ant's appeal bond, has been paid pursuant to the provisions of said bond; admits that on May 22, 1914, said Receivers were in charge of defendant's property; admits that suit by intervener against defendant was first commenced at Fort Worth, Texas, and was there dismissed and subsequently instituted in the United States District Court at Kansas City, Missouri, and that a separate suit was commenced in this Court and in this Division against defendant and that said suit was subsequently dismissed; denies that it was due entirely to protracted litigation and determined efforts upon the part of said defendant and of said Receivers and of Railway Company to defeat the rights of intervener and to have the courts decide that intervener had no claim against defendant, that intervener's claim was not reduced to judgment in ample time for intervener to have intervened in this cause, and to have presented his demand within the time ordered by this Court; denies that the principal object of said order of this Court was to give notice to all persons dealing with defendant's property and to advise this Court of the fact that such a claim did exist. and that that object was fully obtained by the actual notice and knowledge on the part of defendant, of said Receivers, of all parties to this suit, and their attorneys, of the fact that intervener's claims existed and [was] being prosecuted in the courts; admits that a principal object of said order was to give notice to all claimants against defendant of the terms and requirements of said order; avers that it is without knowledge that intervener in August, 1916, gave personally a written notice to Henry W. Taft and other attorneys representing the Reorganization Committee and the purchasers of the property of defendant of all the facts under which intervener's said judgment had been obtained and of the subsequent steps by appeal therein taken; avers that it is without knowledge that no effort of any kind has been made by St. Louis-San Francisco Railway Company or any of the mortgage bondholders or others to make any payment or settlement of intervener's claim; deny that said Trustee and mortgage bondholders, St. Louis-San Francisco Railway and defendant, have each and all had full

knowledge and notice of the pendency of intervener's claim and demand and of the nature thereof.

- 6. Further answering defendant denies that said claims of intervener [is] prior in lien or superior in equality to the Refunding Mortgage and General [Line] Mortgage of defendant.
- 7. Further answering defendant avers that the charges collected by defendant and sought to be recovered herein [fol. 96] were collected during the period of August 1906, to November, 1908; that the sum of money so collected passed into the Treasury of defendant and were by defendant long prior to May, 1913, paid out and expended by defendant as a part of the current and ordinary operating expenses of conducting demodant's system of railroads, and that no part of such sums so collected by defendant remained in defendant's treasury or elsewhere under its control at the time said Receivers were appointed in May, 1913, and that no part of said sums of money ever came into the possession of said Receivers but that all thereof was expended as aforesaid long prior to the appointment of said Receivers.
- 8. Further answering defendant avers that the freight charges so collected by defendant in respect of which recovery is herein sought were collected at regular tariff rates then prescribed by the tariffs under which the shipments to which said charges were applied were transported, and that the freight charges so collected by defendant were the only legal charges that defendant could by law collect in respect of such shipments.
- 9. Further answering defendant avers that by reason of intervener's failure to file his said claim herein in the time prescribed by the terms of said interlocutory Decree, as such times were subsequently extended as aforesaid, intervener is guilty of laches in respect of the presentation of his said claim and should not be heard in a court of equity to now present for allowance and have allowed his said claim.
- 10. Defendant further avers that should the Court permit said claim to remain filed and consider and allow the same, that the same should be allowed only as a general unsecured creditors' claim without priority in lien or superiority in

equity over any of the mortgages of St. Louis-San Francisco Railway Company or of defendant.

Wherefore, having fully answered, defendant prays (a) that said intervening petition be dismissed, or in the event the Court hears and considers and allows the claims presented thereby, in whole or in part, that (b) the same be allowed only as general unsecured creditors claims against defendant as aforesaid.

(Signed) W. F. Evans, E. T. Miller, Solicitors for Defendant.

[fol. 97] We hereby consent to the filing of the foregoing answer. November 28, 1921.

(Signed) S. H. Cowan, D. A. Murphy, John S. Leahy, Walter H. Saunders, Attorneys for Intervenor.

#### IN UNITED STATES DISTRICT COURT

Answer to Petition and Supplemental Petition—Filed April 6th, 1921

Comes now St. Louis-San Francisco Railway Company, a party herein and hereinafter referred to as "Railway Company," and answering the intervening petition and supplemental intervening petition of E. B. Spiller, states:

1. Railway Company pleads in bar of the claim presented by said intervening petition and supplemental intervening petition that said claim arose between the period of August, 1906, to November, 1908, and many years prior to May 27, 1913, the date of the appointment of Receivers in this cause; that by the terms of the Interlocutory Decree made, entered and filed in this cause, all holders of claims against the defendant herein were required to file the same in this cause on or before the date fixed therefor in said Interlocutory Decree, which date was subsequently extended by orders made and entered herein to February 1, 1916, and not thereafter; that said claim presented by intervener herein was determined and established by the Interstate Commerce Commission long prior to February 1, 1916, yet

said claim was not filed herein prior to the date last aforesaid. Railway Company hereby refers to said Interlocutory Decree and to the orders of this Court extending the time for filing claims as aforesaid as a part of the record in this cause to the same effect as if the same were fully set forth herein. By reason whereof Railway Company avers that said intervening petition and said supplemental intervening petition and the claim presented thereby should be dismissed.

- 2. Railway Company further pleading in bar of the claim presented by said intervening petition and supplemental intervening petition avers that said claim arose prior to the entry of the Final Decree herein, to which Final Decree Railway Company hereby refers to the same effect as if [fol. 98] the same were made a part hereof; that in and by said Final Decree and by Articles Ninth and Tenth thereof it was formally adjudicated and decreed that notice had been given for the presentation in this clause of all claims and demands against defendant of every character and description whatsoever, and that the time for the presentation of said claims and demands had expired, and that no claim or demand of the nature of the claim presented by said intervening petition and supplemental intervening petition filed herein that had not been presented in this cause pursuant to decrees and orders herein made should be enforceable against the Receivers appointed in this cause or against the property sold or any part or portion thereof, or against any purchaser of the same or any part thereof, his successors or assigns, nor should the holder thereof be entitled to the benefits of Article Ninth of said Final Decree, nor should any such claim or demand not so presented be entitled to share in the distribution of any of the proceeds of sale under said Final Decree. By reason whereof Railway Company prays that said intervening petition and supplemental intervening petition and each of them and the claim thereby presented be dismissed.
- 3. Railway Company further pleading in bar of the claim presented by said intervening petition and supplemental intervening petition avers that on January 11, 1915, intervener instituted suit in this Court against defendant upon the same claim now presented, to which suit answer

was duly filed on April 12, 1915, and reply thereto was filed on April 15, 1915; that said cause was subsequently continued from time to time and on March 19, 1917, was dismissed for want of prosecution; that on March 22, 1917, on interveners' motion said dismissal was vacated and said cause again continued from time to time and was finally dismissed by this Court for want of prosecution on December 6, 1918. Intervener having failed to prosecute said suit and having suffered said suit to be dismissed for want of prosecution is now and estopped and precluded from attempting to prosecute his said claim in this cause. By reason whereof said intervening petition and said supplemental intervening petition and each of them and the claim thereby presented should be dismissed.

- 4. Railway Company further pleading in bar of said supplemental intervening petition avers that by an order discharging Receivers appointed in this cause made and entered of record January 29, 1918, to which order reference is hereby made to the same effect as if the same were made a part hereof, it is adjudged and decreed that all [fol. 99] claims, demands and liabilities against said Receivers and against the railroad and property delivered by said Receivers to the purchaser thereof and against such purchaser, which then had arisen or might thereafter arise out of said receivership, should be filed in this cause on or before September 1, 1918, and that after said date no further such intervening petition should be permitted in this cause, and that the rights of any claimants who should not on or before such date commence intervention proceedings herein to avail themselves of the remedies provided under said order for their benefit should cease and determine as to such railroad and property and the purchasers thereof; that said claim and demand presented by said supplemental intervening petition, not having been filed herein on or before September 1, 1918, as required by said order, is barred. By reason whereof Railway Company prays that said supplemental intervening petition and the claim thereby presented be dismissed.
- 5. Railway Company therefore prays by reason of the foregoing that the orders heretofore made in this cause allowing said intervening petition and said supplemental

intervening petition to be filed herein be set aside and for naught held, and that said intervening petition and said supplemental intervening petition and each of them be dismissed.

Railway Company, without waiving its pleas in bar hereinbefore stated, and continuing to insist and to rely upon the same in bar of the further prosecution of said intervening petition, answering said intervening petition, states:

First. It admits the allegations of paragraph 1 thereof.

Second. Answering paragraph 2 of said intervening petition it admits that on January 12, 1914, the Interstate Commerce Commission made an order directing defendant and other carriers named in said order to pay to intervener damages resulting from the rates charged by said carriers on the shipments of cattle shown in said order, and that the amount so ordered paid is correctly set forth in said paragraph 2 of said intervening petition; denies that intervener is the lawful assignee in respect of said damages of the consignors referred to in said paragraph 2.

Third. Answering paragraph 3 of said intervening petition it admits the allegations thereof.

Fourth. Answering paragraph 4 of said intervening petition it admits the allegations thereof except the allegation [fol. 100] that the advanced rates therein referred to were unlawful or found to be unlawful by the Interstate Commerce Commission, which allegation it denies.

Fifth. Answering paragraph 5 of said intervening petition it admits the allegations thereof.

Sixth. Answering paragraph 6 of said intervening petition it admits that the matters and things therein stated were made and determined by the said Interstate Commerce Commission as stated in said paragraph.

Seventh. Answering paragraph 7 of said intervening petition it denies that the facts as found by said Interstate Commerce Commission in its said report and opinion were true and correct; denies that the said claims and rights of said owners as shippers and consignors as stated in said paragraph were duly and legally assigned to intervener; denies that intervener was at the date of said order of

said Interstate Commerce Commission and now is the legal and equitable owner and holder of said claims and rights and denies that intervener is entitled to recover the same.

Eighth. Answering paragraph 8 of said intervening petition it admits service upon defendant of said order of said Interstate Commerce Commission and that defendant has failed to pay the same or any part thereof; denies that defendant is liable to intervener for the full amount herein claimed or for any part thereof.

Ninth. Answering paragraph 9 of said intervening petition it admits the allegations of the first section, but answering the last section in said paragraph it denies that it has paid a part of the costs taxed against St. Louis and San Francisco Railroad Company in said cause, including \$3,351.00 as part of the attorneys' fees, leaving a balance of \$30,212.31 with interest from August 1, 1916, at six per cent per annum, and also a balance of \$1,235.00 of said costs unpaid; admits that certain sums were paid as attorneys' fees or costs in said cause pursuant to the terms of the bond given by defendant to secure costs.

Tenth. Answering paragraph 10 of said intervening petition it denies that subsequent to the collection of said charges by defendant there was at all times in its treasury down to the date of the appointment of said Receivers an amount of money equal to or in excess of the aggregate of intervener's claim; denies that the gross receipts of defendant from the time of the collection of said charges [fol. 101] to the appointment of said Receivers were in excess of its actual operating expenses, and that since the appointment of said Receivers the gross receipts have continuously been in excess of defendant's actual operating expenses; admits that since the collection of said charges defendant has paid large sums in excess thereof by way of interest on its mortgage indebtedness and for betterments and improvements; admits that when said Receivers were appointed they received from defendant in cash over \$300,000.00; denies that the earnings of defendant, eliminating all items except current receipts and current expenses, from the time said charges were collected to the appointment of said Receivers were largely in excess of defendant's operating expenses; denies that the money so

paid by said shippers in excess of the reasonable rates as fixed by said Interstate Commerce Commission was an illegal exaction, or that said money belonged to said shippers after payment thereof the same as it did before such payment; denies that it was part of the money in the treasury of defendant which passed to said Receivers; denies that said money was not in any way subject to any liens of the mortgages or other instruments of writing executed by defendant; denies that intervener has a claim prior in lien or superior in equity to the liens and claims of any and all of the bondholders, trustees and mortgagees, and other claimants, holding claims and demands against defendant: denies that it became and was the duty of defendant and of said Receivers and of Railway Company to repay to intervener the amount of said judgment, interest and cost.

Eleventh. Answering paragraph 11 of the intervening petition it admits that a portion of Article Ninth of said Final Decree entered in this cause is correctly stated therein, but refers said Final Decree in its entirety, to the Court for the correct interpretation thereof; denies that intervener's claim and judgment, or either of them, are prior in lien or superior in equity to the Refunding Mortgages and the General Lien Mortgages referred to in said Final Decree; admits that Railway Company is the purchaser of the properties of defendant sold under said Final Decree; denies that intervener duly demanded of Railway Company payment of said judgment, interest and costs after the same had been made final by the Supreme Court of the United States.

Twelfth. Answering paragraph 12 of said intervening petition it denies that it had full knowledge and notice prior to the sale of said property and prior to the confirmation of said sale that intervener had his said claim and was prosecuting the same in court; avers that it is without [fol. 102] knowledge that said Receivers had knowledge thereof; denies that defendant, said Receivers or Railway Company, or any of them, had knowledge that intervener's said claim was prior in lien or superior in equity to the liens of said Refunding Bonds, said General Lien Bonds, and all other liens and claims on defendants' property;

avers that intervener's claim was not prior in lien or superior in equity to the liens of said Refunding Bonds or of said General Mortgage Lien Bonds, or to any other liens or claims against defendants' property; denies that intervener and his attorneys had no knowledge or notice whatever of the order of this Court requiring persons having any claims or demands against defendant to present and fle the same herein within the time therein fixed, or at any time: denies that intervener and his attorneys had no knowledge or notice whatever of the Final Decree herein when the same was entered or at the time of the sale of defendant's property under said decree; denies that the first knowldge and notice that intervener and his attorneys, or either thereof, had of said order of this Court, requiring the presentation of claims and of the Final Decree herein was in August 1916; denies that at the hearing upon the confirmation of said sale intervener's attorneys gave notice to the attorneys for the Reorganization Committee and for the purchasers of said railroad of defendant and for Railway Company and defendant and the attorneys for the Guaranty Trust Company and Bankers Trust Company and all other parties to said cause, that the United States District Court for the Western Division of the Western District of Missouri had given judgment on August 16, 1916, in intervener's favor against defendant for the amount set forth in the intervening petition, and that intervener would file the same as prior in lien and superior in equity of the lien and claim of all other persons whomsoever against the property of defendant; denies that when intervener and his attorneys first learned of said order requiring the presentation of claims against defendant on or before February 1, 1916, said time had expired; admits that intervener was prosecuting his claim in said United States District Court, but avers that intervener had full opportunity to file but failed to file said claim in this Court in this cause as required by said orders and decrees of this Court; and deies that the only remedy intervener had was that prescribed by the Act of Congress as set forth in Section 16 of the Interstate Commerce Act: admits that said Receivers were appointed as such in May, 1913; denies that defendant by its attorneys, who were the same attorneys who [fol. 103] acted for and in behalf of the Receivers of defendant.

appeared in said cause in said United States District Court for the Western Division of the Western District of Missouri and acted and [defendant] the same and took an appeal from the judgment of said Court to the United States Cir. cuit Court of Appeals for the Eighth Circuit and there contested said decision in said District Court, and also anpeared and there contested said decision in the United States Supreme Court: admits that a portion of the costs in said litigation secured by defendant's appeal bond, has been paid pursuant to the provisions of said bond; admits that on May 22, 1914, said Receivers were in charge of defendant's property; admits that suit by intervenor against defendant was first commenced at Fort Worth, Texas, and was there dismissed and subsequently instituted in the United States District Court of Kansas City, Missouri, and that a separate suit was commenced in this Court and in this Division against defendant and that said suit was subsequently dismissed; denies that it was due entirely to protracted litigation and determined efforts upon the part of said defendant and of said Receivers and of Railway Company to defeat the rights of intervener and to have the courts decide that intervener had no claim against defendant, that intervener's claim was not reduced to judgment in ample time for intervener to have intervened in this cause, and to have presented his demand within the time ordered by this Court; denies that the principal object of said order of this Court was to give notice to all persons dealing with defendant's property and to advise this Court of the fact that such a claim did exist, and that that object was fully obtained by the actual notice and knowledge on the part of defendant, of said Receivers, of all parties to this suit, and their attorneys, of the fact that intervener's claim existed and was being prosecuted in the courts; admits that a principal object of said order was to give notice to all claimants against defendant of the terms and requirements of said order; denies that intervener in August, 1916, gave personally a written notice to Henry W. Taft and other attorneys representing the Reorganization Committee and the purchasers of the property of defendant of all the facts under which intervener's said judgment had been obtained and of the subsequent steps by appeal therein taken; admits that no effort of any kind has been made by Railway Company or any of the mortgage bondholders or

others to make any payment or settlement of intervener's claim; deny that said Trustees and mortgage bondholders [fol. 104] and stockholders, Railway Company and defendant, have each and all had full knowledge and notice of the pendency of Intervener's claim and demand and of the nature thereof.

- 6. Further answering Railway Company denies that said claim of intervener is prior in lien or superior in equity to the Refunding Mortgage and General Lien Mortgage of defendant.
- 7. Further answering said supplemental intervening petition Railway Company denies that upon the appointment of Receivers herein they were by orders of this Court then and thereafter made, directed and ordered to prosecute and defend all suits at law or in equity brought against defendant; avers that it is without knowledge that by direction of said Receivers counsel for Receivers appeared in and conducted the defense of said cause No. 4308 in said District Court at Kansas City, Missouri, and continued to defend the same, taking an appeal from the judgment of said District Court to the Circuit Court of Appeals of the Eighth Circuit and defending said cause in the United States Supreme Court; denies that when said cause No. 4308 was appealed to said Court of Appeals said Receivers obtained and caused to be filed in said cause a cost bond in the sum of \$3,500,00, conditioned among other things that defendant would answer all costs if it failed to make good its appeal; denies that in obtaining said bond said Receivers indemnified the surety company thereon against loss by reason of its execution; admits that the amount of attornev's fees adjudged by said District Court to intervener and taxed as costs in said cause No. 4308 was \$4,586,32; denies that to relieve the surety on said bond and because of the agreement of indemnity aforesaid said Receivers paid off and discharged the amount of said bond; admits that certain sums were paid as costs in said cause pursuant to the provisions of said bond; denies that there is due and owing to intervener the sum of \$1,235.13 as a balance of such costs; denies that said attorneys' fees taxed as costs in said cause were incurred and made by the action of said Receivers persuant to orders of this Court in defending and litigating said cause No. 4308; denies that defendant

and said Receivers should be required and ordered to pay said balance of said attorneys' fees.

- 8. Further answering Railway Company avers that the charges collected by defendant and sought to be recovered herein were collected during the period of August, 1906, to [fol. 105] November, 1908; that the sums of money so collected passed into the Treasury of defendant and were by defendant long prior to May, 1913, paid out and expended by defendant as a part of the current and ordinary operating expenses of conducting defendant's system of railroads, and that no part of such sums so collected by defendant remained in defendant's treasury or elsewhere under its control at the time said Receivers were appointed in May, 1913, and that no part of said sums of money ever came into the possession of said Receivers but that all thereof was expended as aforesaid long prior to the appointment of said Receivers.
- 9. Further answering Railway Company avers that the freight charges so collected by defendant in respect of which recovery is herein sought were collected at regular tariff rates then prescribed by the tariffs under which the shipments to which said charges were applied were transported, and that the freight charges so collected by defendant were the only legal charges that defendant could by law collect in respect of such shipments.
- 10. Further answering Railway Company avers that the orders, judgments and decrees entered in this cause and referred to herein and in the intervening petition and supplemental intervening petition, and particularly said Final Decree, the Order of Sale of defendant's properties and the Order Confirming said Sale, constituted and now constitute a lawful contract between this Court and Railway Company, and if Railway Company be required to pay intervener's claim or any thereof presented by the intervening petition and supplemental intervening petition, said contract will thereby be violated to the great and irreparable damage of Railway Company, its bondholders and its creditors, with whom Railway Company contracted in reliance upon the terms of its said contract with this Court.

11. Further answering Railway Company avers that by reason of intervener's failure to file his said claim herein in the time prescribed by the terms of said Interlocutory Decree, as such times were subsequently extended as aforesaid, intervener is guilty of laches in respect of the presentation of his said claim and should not be heard in a court of equity to now present for allowance and have allowed his said claim.

12. Railway Company further avers that should the Court permit said claim to remain filed and consider and allow the same, that the same should be allowed only as a [fol. 106] general unsecured creditors' claim without priority in lien or superiority in equity over any of the mortgages of Railway Company or of defendant, and that the same should not constitute any charge against the property of Railway Company acquired at the foreclosure sale of defendant's property or otherwise, nor should the same constitute a demand or charge against Railway Company in any other respect than as a general unsecured creditors' claim against defendant.

Wherefore, having fully answered, Railway Company pray (a) that said intervening petition and said supplemental intervening petition and each of them be dismissed, or in the event the Court hears and considers and allows such claims that (b) the same be allowed only as a general unsecured creditors' claim against defendant as aforesaid.

W. F. Evans, M. G. Roberts, E. T. Miller, Solicitors for St. Louis-San Francisco Railway Company

#### IN UNITED STATES DISTRICT COURT

### [Title omitted]

#### Consolidated Cause Final

In the Matter of the Intervention of E. B. Spiller et al. Intervening Petition No. 402

Answer of Defendant to Intervening Petition—Filed November 30, 1921

Comes now above-named defendant and by leave of Court files this its answer to the intervening petition of E. B. Spiller, et al., and answering, states:

- 1. Defendant pleads in bar of the claims and each of them presented by said intervening petition that said claims, and each of them, arose between the period of August, 1906, to November, 1908, and many years prior to May 27, 1913, the date of appointment of Receivers in this cause; that by the terms of the Interlocutory Decree made, entered and filed in this cause, all holders of claims against the defendant herein were required to file the same in this Ifol. 1071 cause on or before the date fixed therefor in said Interlocutory Decree, which date was subsequently extended by orders made and entered herein to February 1. 1916, and not thereafter; that said claims, and each of them. presented by interveners herein were determined and established by the Interstate Commerce Commission long prior to February 1, 1916, yet none of said claims were filed herein prior to the date last aforesaid. Defendant hereby refers to said Interlocutory Decree and to the orders of this Court extending the time for filing claims as aforesaid as a part of the record in this cause to the same effect as if the same were fully set forth herein. By reason whereof defendant avers that said intervening petition and the claims and each of them presented thereby should be dismissed.
- 2. Defendant further pleading in bar of the claims and each of them presented by said intervening petition avers that said claims, and each of them, arose prior to the entry of the final Decree herein, to which Final Decree defendant hereby refers to the same effect as if the same were made a

part hereof; that in and by said Final Decree and by Articles Ninth and Tenth thereof it was formally adjudicated and decreed that notice had been given for the presentation in this cause of all claims and demands against defendant of every character and description whatsoever, and that the time for the presentation of said claims and demands had expired, and that no claims or demands of the nature of those presented by said intervening petition filed herein that had not been presented in this cause pursuant to decrees and orders herein made should be enforceable against the Receivers appointed in this cause or against the property sold or any part or portion thereof, or against any purchaser of the same or any part thereof, his successors or assigns, nor should the holder thereof be entitled to the benefits of Article Ninth of said Final Decree, nor should any such claims or demands not so presented be entitled to share in the distribution of any of the proceeds of sale under said Final Decree. By reason whereof defendant prays that said intervening petition and the claims and each of them thereby presented be dismissed.

- 3. Defendant further pleading in bar of the claims and each of them presented by said intervening petition avers that on January 11, 1915, interveners instituted suit in this Court against defendant upon the same claims now presented, to which suit answer was duly filed on April 12, [fol. 108] 1915, and reply thereto was filed on April 15, 1915; that said cause was subsequently continued from time to time and on March 19, 1917, was dismissed for want of prosecution; that on March 22, 1917, on interveners' motion said dismissal was vacated and said cause again continued from time to time and was finally dismissed by this Court for want of prosecution on December 6, 1918. Interveners having failed to prosecute said suit and having suffered said suit to be dismissed for want of prosecution are now estopped and precluded from attempting to prosecute their said claims in this cause. By reason whereof said intervening petition and the claims and each of them thereby presented should be dismissed.
- 4. Defendant therefore prays by reason of the foregoing that the orders heretofore made in this cause allowing said intervening petition to be filed herein be set aside and for

naught held, and that said intervening petition be dismissed.

Defendant, without waiving its pleas in bar hereinbefore stated, and continuing to insist and to rely upon the same in bar of the further prosecution of said intervening petition, answering said intervening petition, states:

First. It admits the allegation of paragraph 1 thereof.

Second. Answering paragraph 2 of said intervening petition it admits that on January 12, 1914, the Interstate Commerce Commission made an order directing defendant and other carriers named in said order to pay to shippers therein named damages resulting from rates charged carriers on shipments of cattle shown in said order, and that the amount so ordered paid and the parties to whom payable are correctly set forth in said paragraph 2 of said intervening petition.

Third. Answering paragraph 3 of said intervening petition it admits the allegations thereof.

Fourth. Answering paragraph 4 of said intervening petition it admits the allegations thereof except the allegations that the advanced rates therein referred to were unlawful or found to be unlawful by the Interstate Commerce Commission, which said allegation it denies.

Fifth. Answering paragraph 5 of said intervening petition it admits the allegations thereof.

Sixth. Answering paragraph 6 of said intervening petition it admits that the matters and thing therein stated were [fol. 109] made and determined by the said Interstate Commerce Commission as stated in said paragraph, except that it denies that said Commission found said rates to be unlawful.

Seventh. Answering paragraph 7 of said intervening petition it denies that the facts as found by said Interstate Commerce Commission in its said report and opinion were true and correct; it denies that interveners are the legal and equitable owners and holders of the claims presented by said intervening petition; and denies that they or any of them are entitled to recover the same.

Eighth. Answering paragraph 8 of said intervening petition it admits service upon defendant of said order of said Interstate Commerce Commission and that defendant has failed to pay the same or any part thereof; denies that defendant is liable to interveners for the full amount herein claimed or for any part thereof.

Ninth. Answering paragraph 9 of said intervening petition it admits the allegations thereof.

Tenth. Answering paragraph 10 of said intervening petition it denies that subsequent to the collection of said charges by defendant there was at all times in its treasury down to the date of the appointment of said Receivers an amount of money equal to or in excess of the aggregate of intervener's claims; denies that the gross receipts of defendant from the time of the collection of said charges to the appointment of said Receivers were in excess of its actual operating expenses, and avers that it is without knowledge that since the appointment of said Receivers the gross receipts have continuously been in excess of defendant's actual operating expenses; admits that since the collection of said charges defendant has paid large sums in excess thereof by way of interest on its mortgage indebtedness and for betterments and improvements; admits that when said Receivers were appointed they received from defendant in cash over \$300,000,00; denies that the earnings of defendant, eliminating all items except current receipts and current expenses, from the time said charges were collected to the appointment of said Receivers were largely in excess of defendant's operating expenses; denies that the money so paid by said Shippers in excess of the reasonable rates as fixed by said Interstate Commerce Commission was an illegal exaction, or that said money belonged to said shippers after payment thereof the same as it did before such payment; denies that it was part of the money in the treasury of defendant which passed to said Receivers; denies that said money was not in any way sub-[fol. 110] ject to any liens of the mortgages or other instruments of writing executed by defendant; denies that interveners have a claim prior in lien or superior in equity to the liens and claims of any and all of the bondholders, trustees and mortgagees, and other claimants, holding

claims and demands against defendant; denies that it became and was the duty of defendant and of said Receivers and of St. Louis-San Francisco Railway Company to repay to interveners the amount of said judgment, interest and costs.

Eleventh. Answering paragraph 11 of the intervening petition it admits that a portion of Article Ninth of said Final Decree entered in this cause is correctly stated therein, but refers said Final Decree in its entirety to the Court for the correct interpretation thereof; denies that interveners' claims and judgment, or either of them, are prior in lien or superior in equity to the Refunding Mortgages and the General Lien Mortgages referred to in said Final Decree; admits that St. Louis-San Francisco Railway Company is the purchaser of the properties of defendant sold under said Final Decree; avers that it is without knowledge that interveners duly demanded of St. Louis-San Francisco Railway Company payment of said judgment, interest and costs after the same had been made final by the Supreme Court of the United States.

Twelfth, Answering paragraph 12 of said intervening petition it denies that it had full knowledge and notice prior to the sale of said property and prior to the confirmation of said sale that interveners had their said claims and were prosecuting the same in court; avers that it is without knowledge that said Receivers had knowledge thereof; denies that defendant had knowledge that interveners' said claims were prior in lien or superior in equity to the liens of said Refunding Bonds, said General Lien Bonds, and all other liens and claims on defendant's property; avers that interveners' claims were not prior in lien or superior in equity to the liens of said Refunding Bonds or of said General Mortgage Lien Bonds, or to any other liens or claims against defendant's property; denies that interveners and their attorneys had no knowledge or notice whatever of the order of this Court requiring persons having any claims or demands against defendant to present and file the same herein within the time therein fixed, or at any time; denies that interveners and their attorneys had no knowledge or notice whatever of the Final Decree herein when the same was entered or at the time of the sale of

defendant's property under said decree; denies that the first knowledge and notice that interveners and their at-[fol. 111] torneys, or any of them, had of said order of this Court requiring the presentation of claims and of the Final Decree herein was in August, 1916; avers that it is without knowledge that at the hearing upon the confirmation of said sale interveners' attorneys gave notice to the attorneys for the Reorganization Committee and for the purchasers of said railroad of defendant and for St. Louis-San Francisco Railway Company and defendant, and the attorneys for the Guaranty Trust Company and Bankers Trust Company and all other parties to said cause, that the United States District Court for the Western Division of the Western District of Missouri had given judgment on August 16, 1916, in interveners' favor against defendant for the amount set forth in the intervening petition, and that interveners would file the same as prior in lien and superior in equity of the lien and claims of all other persons whomsoever against the property of defendant; denies that when interveners and their attorneys first learned of said order requiring the presentation of claims against defendant on or before February 1, 1916, said time had expired; admits that interveners were prosecuting their claims in said United States District Court, but avers that interveners had full opportunity to file but failed to file said claims in this Court in this cause as required by said orders and decrees of this Court; denies that the only remedy interveners had was that prescribed by the Act of Congress as set forth in Section 16 of the Interstate Commerce Act; admits that said Receivers were appointed as such in May, 1913, and thereupon took charge of the railroad property of defendant, but denies that said Receivers took charge of all litigation to which said railroad was a party; denies that the attorneys for said Receivers were the same attorneys who had acted for defendant before the Interstate Commerce Commission in said proceedings, and continued to act as such until said order of said Interstate Commerce Commission; denies that said same attorneys appeared and contested said claims of interveners in case No. 4320 in said District Court of the Western District of Missouri: denies that said same attorneys acted for defendant in entering into the stipulation in said cause, referred to in said paragraph of said intervening petition, and that said at-

torneys appeared and contested the judgment of said United States District Court in the Circuit Court of Appeals and in the United States Supreme Court; admits that a portion of the costs in said litigation, secured by defendant's appeal bond, has been paid pursuant to the provisions of said bond; admits that on May 22, 1914, said Receivers were in charge of defendant's property; admits that suits by in-[fol. 112] terveners against defendant were first commenced at Fort Worth, Texas, and were there dismissed and subsequently instituted in the United States District Court at Kansas City, Missouri, and that a separate suit was commenced in this Court and in this Division against defendant and that said suit was subsequently dismissed; denies that it was due entirely to protracted litigation and determined efforts upon the part of said defendant and of said Receivers and of St. Louis-San Francisco Railway Company to defeat the rights of interveners and to have the courts decide that interveners had no claim against defendant, that interveners' claims were not reduced to judgment in ample time for interveners to have intervened in this cause, and to have presented their demands within the time ordered by this Court; denies that the principal object of said order of this Court was to give notice to all persons dealing with defendant's property and to advise this Court of the fact that such claims did exist, and that that object was fully obtained by the actual notice and knowledge on the part of defendant, of said Receivers, of all parties to this suit, and their attorneys, of the fact that interveners' claims existed and were being prosecuted in the courts; admits that a principal object of said order was to give notice to all claimants against defendant of the terms and requirements of said order; avers that it is without knowledge that interveners in August, 1916, gave personally a written notice to Henry W. Taft and other attorneys representing the Reorganization Committee and the purchasers of the property of defendant of all the facts under which interveners' said judgment had been obtained and of the subsequent steps by appeal therein taken; avers that it is without knowledge that no effort of any kind has been made by St. Louis-San Francisco Railway Company or any of the mortgage bondholders or others to make any payment or settlement of interveners' claims; deny that said Trustees and mortgage bondholders and stockholders, St. Louis-San

Francisco Railway Company and defendants, have each and all had full knowledge and notice of the pendency of interveners' claims and demands of the nature thereof.

- Further answering defendant denies that said claims of interveners are prior in lien or superior in equity to the Refunding Mortgage and General Lien Mortgage of defendant.
- 7. Further answering defendant avers that the charges collected by defendant and sought to be recovered herein were collected during the period of August, 1906, to November, 1908; that the sums of money so collected passed [fol. 113] into the Treasury of defendant and were by defendant long prior to May, 1913, paid out and expended by defendant as a part of the current and ordinary operating expenses of conducting defendant's system of railroads, and that no part of such sums so collected by defendant remained in defendant's treasury or elsewhere under its control at the time said Receivers were appointed in May, 1913, and that no part of said sums of money ever came into the possession of said Receivers but that all thereof was expended as aforesaid long prior to the appointment of said Receivers.
- 8. Further answering defendant avers that the freight charges so collected by defendant in respect of which recovery is herein sought were collected at regular tariff rates then prescribed by the tariffs under which the shipments to which said charges were applied were transported, and that the freight charges so collected by defendant were the only legal charges that defendant could by law collect in respect of such shipments.
- 9. Further answering defendant avers that by reason of interveners' failure to file their said claims herein in the time prescribed by the terms of said Interlocutory Decree, as such times were subsequently extended as aforesaid, interveners are guilty of laches in respect of the presentation of their said claims and should not be heard in a court of equity to now present for allowance and have allowed their said claims or any of them.
- 10. Defendant further avers that should the Court permit said claims to remain filed and consider and allow the

same, that the same should be allowed only as general unsecured creditors' claims without priority in lien or superiority in equity over any of the mortgages of St. Louis-San Francisco Railway Company or of defendant.

Wherefore, having fully answered, defendant prays (a) that said intervening petition be dismissed, or in the event the Court hears and considers and allows the claims presented thereby, in whole or in part that, (b) the same be allowed only as general unsecured creditors, claims against defendant as aforesaid.

W. J. Evans, E. T. Miller, Solicitors for Defendant.

[fol. 114] We hereby consent to the filing of the foregoing answer.

November 28, 1921.

S. H. Cowan, D. A. Murphy, John S. Leahy, Walter H. Saunders, Attys. for Intervener.

### IN UNITED STATES DISTRICT COURT

## [Title omitted]

# Consolidated Cause Final

In the Matter of the Intervention of E. B. Spiller et al. Intervening Petition No. 402

Answering to Petition and Supplemental Petition— Filed April 6, 1921

Comes now St. Louis-San Francisco Railway Company, a party herein and hereinafter referred to as "Railway Company," and answering the intervening petition and supplemental intervening petition of E. B. Spiller, et al., states:

1. Railway Company pleads in bar of the claims and each of them presented by said intervening petition and supplemental intervening petition that said claims, and each of them, arose between the period of August, 1906, to November, 1908, and many years prior to May 27, 1913,

the date of the appointment of Receivers in this cause; that by the terms of the Interlocutory Decree made, entered and filed in this cause, all holders of claims against the defendant herein were required to file the same in this cause on or before the date fixed therefor in said Interlocutory Decree, which date was subsequently extended by orders made and entered herein to February 1, 1916, and not thereafter; that said claims, and each of them, presented by interveners herein were determined and established by the Interstate Commerce Commission long prior to February 1, 1916, yet none of said claims were filed herein prior to the date last aforesaid. Railway Company hereby refers to said Interlocutory Decree and to the orders of this Court [fol. 115] extending the time for filing claims as aforesaid as part of the record in this cause to the same effect as if the same were fully set forth herein. By reason whereof Railway Company avers that said intervening petition and said supplemental intervening petition and the claims and each of them presented thereby should be dismissed.

2. Railway Company further pleading in bar of the claims and each of them presented by said intervening petition and supplemental intervening petition avers that said claims, and each of them, arose prior to the entry of the Final Decree herein, to which Final Decree Railway Company hereby refers to the same effect as if the same were made a part hereof; that in and by said Final Decree and by Articles Ninth and Tenth thereof it was formally adjudicated and decreed that notice had been given for the presentation in this cause of all claims and demands against defendant of every character and description whatsoever, and that the time for the presentation of said claims and demands had expired, and that no claims or demands of the nature of those presented by said intervening petition and supplemental intervening petition filed herein that had not been presented in this cause pursuant to decrees and orders herein made should be enforceable against the Receivers appointed in this cause or against the property sold or any part or portion thereof, or against any purchaser of the same or any part thereof, his successors or assigns, nor should the holders thereof be entitled to the benefits of Article Ninth of said Final Decree, nor should any such claims or demands not so presented be entitled to share in

the distribution of any of the proceeds of sale under said Final Decree. By reason whereof Railway Company prays that said intervening petition and supplemental intervening petition and each of them and the claims and each of them thereby presented be dismissed.

- 3. Railway Company further pleading in bar of the claims and each of them presented by said intervening petition and supplemental intervening petition avers that on January 11, 1915, interveners instituted suit in this Court against defendant upon the same claims now presented. to which suit answer was duly filed on April 12, 1915, and reply thereto was filed on April 15, 1915; that said cause was subsequently continued from time to time and on March 19, 1917, was dismissed for want of prosecution; that on March 22, 1917, on interveners' motion said dismissal was vacated and said cause again continued from time to time and was finally dismissed by this Court for want of prosecu-[fol. 116] tion on December 6, 1918. Interveners having failed to prosecute said suit and having suffered said suit to be dismissed for want of prosecution are now estopped and precluded from attempting to prosecute their said claims in this cause. By reason whereof said intervening petition and said supplemental intervening petition and each of them and the claims and each of them thereby presented should be dismissed.
- 4. Railway Company further pleading in bar of said supplemental intervening petition avers that by an order discharging Receivers appointed in this cause made and entered of record January 29, 1918, to which order reference is hereby made to the same effect as if the same were made a part hereof, it is adjudged and decreed that all claims, demands and liabilities against said Receivers and against the railroad and property delivered by said Receivers to the purchaser thereof and against such purchaser, which then had arisen or might thereafter arise out of said receivership, should be filed in this cause on or before September 1, 1918, and that after said date no further such intervening petition should be permitted in this cause, and that the rights of any claimants who should not on or before such date commence intervention proceedings herein to avail themselves of the remedies provided under said

order for their benefit should cease and determine as to such railroad and property and the purchaser thereof; that said claims and demands presented by said supplemental intervening petition, not having been filed herein on or before September 1, 1918, as required by said order, and each of them, are barred. By reason whereof Railway Company prays that said supplemental intervening petition and the claims thereby presented and each of them be dismissed.

5. Railway Company therefore prays by reason of the foregoing that the orders heretofore made in this cause allowing said intervening petition and said supplemental intervening petition to be filed herein be set aside and for naught held, and that said intervening petition and said supplemental intervening petition and each of them be dismissed.

Railway Company, without waiving its pleas in bar hereinbefore stated, and continuing to insist and to rely upon the same in bar of the further prosecution of said intervening petition and said supplemental intervening petition, answering said intervening petition, states:

First. It admits the allegations of paragraph 1 thereof.

[fol. 117] Second. Answering paragraph 2 of said intervening petition it admits that on January 12, 1914, the Interstate Commerce Commission made an order directing defendant and other carriers named in said order to pay to shippers therein named damages resulting from rates charged by said carriers on shipments of cattle shown in said order, and that the amounts so ordered paid and the parties to whom payable are correctly set forth in said paragraph 2 of said intervening petition.

Third. Answering pargraph 3 of said intervening petition it admits the allegations thereof.

Fourth. Answering paragraph 4 of said intervening petition it admits the allegations thereof except the allegation that the advanced rates therein referred to were unlawful or found to be unlawful by the Interstate Commerce Commission, which said allegation it denies.

Fifth. Answering paragraph 5 of said intervening petition it admits the allegations thereof.

Sixth. Answering paragraph 6 of said intervening petition it admits that the matters and things therein stated were made and determined by the said Interstate Commerce Commission as stated in said paragraph.

Seventh. Answering paragraph 7 of said intervening petition it denies that the facts as found by said Interstate Commerce Commission in its said report and opinion were true and correct; it denies that interveners are the legal and equitable owners and holders of the claims presented by said intervening petition; and denies that they or any of them are entitled to recover the same.

Eighth. Answering paragraph 8 of said intervening petition it admits service upon defendant of said order of said Interstate Commerce Commission and that defendant has failed to pay the same or any part thereof; denies that defendant is liable to interveners for the full amount herein claimed or for any part thereof.

Ninth. Answering paragraph 9 of said intervening petition it admits the allegations thereof.

Tenth. Answering paragraph 10 of said intervening petition it denies that subsequent to the collection of said charges by defendant there was at all times in its treasury down to the date of the appointment of said Receivers an [fol. 118] amount of money equal to or in excess of the aggregate of interveners' claims; denies that the gross receipts of defendant from the time of collection of said charges to the appointment of said Receivers were in excess of its actual operating expenses, and that since the appointment of said Receivers the gross receipts have continuously been in excess of defendant's actual operating expenses: admits that since the collection of said charges defendant has paid large sums in excess thereof by way of interest on its mortgage indebtedness and for betterments and improvements; admits that when said Receivers were appointed they received from defendant in cash over \$300,-000.00; denies that the earnings of defendant, eliminating all items except current receipts and current expenses, from the time said charges were collected to the appointment of said Receivers were largely in excess of defendant's operating expenses; denies that the money so paid by said shippers in excess of the reasonable rates as fixed by said Commerce Commission was an illegal exaction, or that said money belonged to said shippers after payment thereof the same as it did before such payment; denies that it was part of the money in the treasury of defendant which passed to said Receivers; denies that said money was not in any way subject to any liens of the mortgages or other intruments of writing executed by defendant; denies that interveners have a claim prior in lien or superior in equity to the liens and claims of any and all of the bondholders, trustees and mortgagees, and other claimants holding claims and demands against defendant; denies that it became and was the duty of defendant and of said Receivers and of Railway Company to repay to interveners the amount of said judgment, interest and costs.

Eleventh. Answering paragraph 11 of the intervening petition it admits that a portion of Article Ninth of said Final Decree entered in this cause is correctly stated therein, but refers to said Final Decree in its entirety to the Court for the correct interpretation thereof; denies that interveners' claims and judgment, or either of them, are prior in lien or superior in equity to the Refunding Mortgages and the General Lien Mortgages referred to in said Final Decree; admits that Railway Company is the purchaser of the properties of defendant sold under said Final Decree; denies that interveners duly demand of Railway Company payment of said judgment, interest and costs after the same had been made final by the Supreme Court of the United States.

[fol. 119] Twelfth. Answering paragraph 12 of said intervening petition it denies that it had full knowledge and notice prior to the sale of said property and prior to the confirmation of said sale that interveners had their said claims and were prosecuting the same in court; avers that it is without knowledge that said Receivers had knowledge thereof; denies that defendant, said Receivers or Railway Company, or any of them, had knowledge that interveners' said claims were prior in lien or superior in equity to the liens of said Refunding Bonds, said General Lien Bonds, and all other liens and claims on defendant's property; avers that interveners' claims were not prior in lien or

superior in equity to the liens of said Refunding Bonds or of said General Mortgage Lien Bonds, or to any other liens or claims against defendant's property; denies that interveners and their attorneys had no knowledge or notice whatever of the order of this Court requiring persons having any claims or demands against defendant to present and file the same herein within the time therein fixed, or at any time; denies that interveners and their attorneys had no knowledge or notice whatever of the Final Decree herein when the same was entered or at the time of the sale of defendant's property under said decree; denies that the first knowledge and notice that interveners and their attorneys, or any of them, had of said order of this Court requiring the presentation of claims and of the Final Decree herein was in August, 1916; denies that at the hearing upon the confirmation of said sale interveners' attorneys gave notice to the attorneys for the Reorganization Committee and for the purchasers of said railroad of defendant and for Railway Company and defendant and the attorneys for the Guaranty Trust Company and Bankers Trust Company and all other parties to said cause, that the United States District Court for the Western Division of the Western District of Missouri had given judgment on August 16. 1916, in interveners favor against defendant for the amount set forth in the intervening petition, and that interveners would file the same as prior in lien and superior in equity of the lien and claim of all other persons whomsoever against the property of defendant; denies that when interveners and their attorneys first learned of said order requiring the presentation of claims against defendant on or before February 1, 1916, said time had expired; admits that interveners were prosecuting their claims in said United States District Court, but avers that interveners had full opportunity to file but failed to file said claims in this Court in this cause as required by said orders and [fol. 120] decrees of this Court; denies that the only remedy interveners had was that prescribed by the Act of Congress as set forth in Section 16 of the Interstate Commerce Act; admits that said Receivers were appointed as such in May, 1913, and thereupon took charge of the railroad property of defendant, but denies that said Receivers took charge of all litigation to which said railroad was a party; denies

that the attorneys for said Receivers were the same attornevs who had acted for defendant before the Interstate Commerce Commission in said proceedings, and continued to act as such until said order of said Interstate Commerce Commission: denies that said same attorneys appeared and contested said claims of interveners in case No. 4320 in said District Court of the Western District of Missouri; denies that said same attorneys acted for defendant in entering into the stipulation in said cause, referred to in said paragraph of said intervening petition, and that said attorneys appeared and contested the judgment of said United States District Court in the Circuit Court of Appeals and in the United States Supreme Court; admits that a portion of the costs in said litigation, secured by defendant's appeal bond, has been paid pursuant to the provisions of said bond; admits that on May 22, 1914, said Receivers were in charge of defendants' property; admits that suits by interveners against defendant were first commenced at Fort Worth, Texas, and were there dismissed and subsequently instituted in the United States District Court at Kansas City, Missouri, and that a separate suit was commenced in this Court and in this Division against defendant and that said suit was subsequently dismissed; denies that it was due entorely to protracted litigation and determined efforts upon the part of said defendant and of said Receivers and of Railway Company to defeat the rights of interveners and to have the courts decide that interveners had no claim against defendant, that interveners' claims were not reduced to judgment in ample time for interveners to have intervened in this case, and to have presented their demands within the time ordered by this Court; denies that the principal object of said order of this Court was to give notice to all persons dealing with defendant's property and to advise this Court of the fact that such claims did exist, and that that object was fully obtained by the actual notice and wo knowledge on the part of defendant, of said Receivers, of all parties to this suit, their attorneys, of the fact that interveners' claims existed and were being prosecuted in the courts; admits that a principal object of said order was to give notice to all claimants against defendant of the terms [fol. 121] and requirements of said order; denies that interveners in August, 1916, gave personally a written notice to Henry W. Taft and other attorneys representing the Reorganization Committee and the purchasers of the property of defendant of all the facts under which interveners' said judgment had been obtained and of the subsequent steps by appeal therein taken; admits that no effort of any kind has been made by Railway Company or any of the mortgage bondholders or others to make any payment or settlement of interveners' claims; deny that said Trustees and mortgage bondholders and stockholders, Railway Company and defendant, have each and all had full knowledge and notice of the pendency of interveners' claims and demands and of the nature thereof.

- 6. Further answering Railway Company denies that said claims of interveners are prior in lien or superior in equity to the Refunding Mortgage and General Lien Mortgage of defendant.
- 7. Further answering said supplemental intervening petition Railway Company denies that upon the appointment of Receivers herein they were by orders of this Court then and thereafter made, directed and ordered to prosecute and defend all suits at law or in equity brought against defendant: avers that it is without knowledge that by direction of said Receivers counsel for Receivers appeared in and conducted the defense of said cause No. 4320 in said District Court at Kansas City, Missouri, or that a stipulation was entered into between counsel for interveners and counsel for said Receivers providing that the result of said cause No. 4320 should abide the final judgment in cause No. 4308 pending in said District Court; avers that it is without knowledge that defendant in said cause No. 4308 acted through counsel for said Receivers in appealing from the judgment entered in said cause to the Circuit Court of Appeals of the Eighth Circuit, and prosecuted said appeal in said last-named Court and defendant said cause in the Supreme Court of the United States; denies that the attorneys' fees allowed as costs by said District Court at Kansas City were incurred and made by the action of said Receivers in defending and litigating said causes Nos. 4320 and 4308; denies that defendant and said Receivers should be required and ordered to pay said costs.

- 8. Further answering Railway Company avers that the charges collected by defendant and sought to be recovered herein were collected during the period of August, 1906, to [fol. 122] November, 1908; that the sums of money so collected passed into the Treasury of defendant and were by defendant long prior to May, 1913, paid out and expended by defendant as a part of the current and ordinary operating expenses of conducting defendant's system of railroads, and that no part of such sums so collected by defendant remained in defendant's treasury or elsewhere under its control at the time said Receivers were appointed in May, 1913, and that no part of said sums of money ever came into the possession of said Receivers but that all thereof was expended as aforesaid long prior to the appointment of said Receivers.
- 9. Further answering Railway Company avers that the freight charges so collected by defendant in respect of which recovery is herein sought were collected at regular tariff rates then prescribed by the tariffs under which the shipments to which said charges were applied were transported, and that the freight charges so collected by defendant were the only legal charges that defendant could by law collect in respect of such shipments.
- 10. Further answering Railway Company avers that the orders, judgments and decrees entered in this cause and referred to herein and in the intervening petition, and supplemental intervening petition, and particularly said Final Decree, the Order of Sale of defendant's properties and the Order confirming said Sale, constituted and now constitute a lawful contract between this Court and Railway Company, and if Railway Company be required to pay interveners' claims or any thereof presented by the intervening petition and supplemental intervening petition, said contract will thereby be violated to the great and irreparable damage of Railway Company, its bondholders and its creditors, with whom Railway Company contracted in reliance upon the terms of its said contract with this Court.
- 11. Further answering Railway Company avers that by reason of interveners' failure to file their said claim herein in the time prescribed by the terms of said Interlocutory Decree, as such times were subsequently ex-

tended as aforesaid, interveners are guilty of laches in respect of the presentation of their said claims and should not be heard in a court of equity to now present for allowance and have allowed their said claims or any of them.

12. Railway Company further avers that should the Court permit said claims to remain filed and consider [fol. 123] and allow the same, that the same should be allowed only as general unsecured creditors' claims without priority in lien or superiority in equity over any of the mortgages of Railway Company or of Defendant, and that the same should not constitute any charges against the property of Railway Company acquired at the foreclosure sale of defendant's property or otherwise, nor should the same constitute a demand or charge against Railway Company in any other respect than as a general unsecured creditors' claim against defendant.

Wherefore, having fully answered, Railway Company prays (a) that said intervening petition and said supplemental intervening petition and each of them be dismissed, or in the event the Court hears and considers and allows such claims that (b) the same be allowed only as a general unsecured creditors' claim against defendant as aforesaid.

W. F. Evans, M. G. Roberts, E. T. Miller, Solicitors for St. Louis-San Francisco Railway Company.

# IN UNITED STATES DISTRICT COURT

## [Title omitted]

REPORT OF SPECIAL MASTER-Filed February 28, 1921.

[fol. 124] The undersigned Special Master, respectfully reports to this Honorable Court, that the above-entitled companion interventions were jointly heard by him upon the pleadings, the evidence adduced including the stipulation as to facts filed, and the briefs of counsel who appeared in behalf of the respective parties.

The Special Master attaches hereto a synopsis of the pleadings, finding of facts and conclusions of law, and prays that the same be taken as a part of this report as

fully as if herein set out at length.

In pursuance thereof, the Special Master recommends to this court as follows:

(1) That the court enter judgment herein in favor of the intervening petitioner, E. B. Spiller, in the sum of \$30,-212.31, with interest thereon at six per cent per annum from August 1, 1916, until paid, being the amount, other than attorneys' fees taxed as costs, awarded to said intervener by the judgment of the District Court of the United States for the Western Division of the Western Judicial District of Missouri, in case No. 4308 of E. B. Spiller, plaintiff vs. St. Louis & San Francisco Railroad Company, defendant; and that this court enter its further judgment in favor of intervenor, E. B. Spiller, in the sum of \$1,235,13, being the unpaid balance of attorneys' fees allowed to said intervenor, as plaintiff in said cause, and [fol. 125] taxed as costs, the total amount of this judgment, namely, \$31,447,44 to be adjudged as prior in lien and superior in equity to the refunding mortgage and the general lien mortgage of the St. Louis & San Francisco Railroad Company, and directed to be enforced against the property conveyed to the St. Louis-San Francisco Railway Company, as assignee of the purchasers at the foreclosure sale heretofore had in this consolidated receivership cause.

The Special Master further recommends to this court as follows:

(2) That the court enter judgment herein in favor of the intervening petitioners, E. B. Spiller, Bailey & Townsend, Baker & Brown, W. M. Barringer, Battles & Denton, G. W. Battles, F. N. Belshe, Boedecker & Ball, T. J. Brown, Cain & Kelley, Thomas Chism, Tom Durant, S. H. Elliott, R. M. Evans, C. J. Fogleman, R. L. Hall, J. R. Hamilton, Haynes & Hogenkamp, Hansley & Brumit, Hodges & Payne, C. W. Jackson, R. H. Jackson, James & Cardin, James & Jamison, J. E. Kelley, Kimble & Co., King Bros., Lance & Charley, Murrell & Clary, W. L. Payne & Son, J. J. Pickens, F. B. Severs, T. J. Smith, Cal Stewart, R. W. Stubblefield, Three Circle Ranch, N. T. Trout, Frank Vincent, Wall & McFish, O. G. Warren, H. Willis, W. D. Woods, J. A. Wynne and Yohoko Farm & Stock Company, in the sum of \$365.97, with interest thereon at six per cent per annum from August 1, 1916, until paid, being the amount, other than attorneys'

fees taxed as costs, awarded to said interveners by the judgment of the District Court of the United States for the Western Division of the Western Judicial District of Missouri, in case No. 4320 of E. B. Spiller et al., plaintiffs vs. St. Louis & San Francisco Railroad Company, defendant: and that this court enter its further judgment in favor of interveners, E. B. Spiller, Bailey & Townsend, Baker & Brown. W. M. Barringer, Battles & Denton, G. W. Battles, F. N. Belshe, Boedecker & Ball, T. J. Brown, Cain & Kelley, Thomas Chism, Tom Durant, S. H. Elliott, R. M. Evans. C. J. Fogleman, R. L. Hall, J. R. Hamilton, Haynes & Hogenkamp, Hensley & Brumit, Hodges & Payne, G. W. Jackson, R. H. Jackson, James & Cardin, James & Jamison, J. E. Kelley, Kimble & Co., King Bros., Lance & Charley, Murrell & Clary, W. L. Payne & Son, J. J. Pickens, F. B. Severs, T. J. Smith, Cal Stewart, R. W. Stubblefield, Three Circle Ranch, N. T. Trout, Frank Vincent, Wall & McFish, O. G. Warren, H. Willis, W. D. Woods, J. A. Wynne, and Yohoko Farm & Stock Company, in the sum of \$365.29. [fol. 126] being the amount of attorneys' fees allowed to said interveners, as plaintiffs in said cause, and taxed as costs, the total amount of this judgment, namely, \$4,018.36, to be adjudged as prior in lien and superior in equity to the refunding mortgage and the general lien mortgage of the St. Louis & San Francisco Railroad Company, and directed to be enforced against the property conveyed to the St. Louis-San Francisco Railway Company, as assignee of the purchasers at the foreclosure sale heretofore had in this consolidated receivership cause.

The Special Master further recommends that the costs of this proceeding shall be taxed against the defendants herein.

Respectfully submitted,

Thomas T. Fauntleroy, Special Master.

Synopsis of Pleadings on E. B. Spiller Intervention

# Intervening Petition

This proceeding was instituted by E. B. Spiller, a citizen and resident of the State of Texas, against the various parties complainant and defendant in the above entitled causes

and against the St. Louis-San Francisco Railway Company, the assignee of the purchasers at foreclosure sale in the consolidated receivership of the St. Louis & San Francisco Railroad Company, and against the receivers of the said St. Louis & San Francisco Railroad Company, appointed, qualified and acting in said receivership cause, by the filing on December 2, 1920, of an intervening petition upon leave of court granted on formal application, due notice and full hearing. On March 10, 1921, said intervenor filed a separate and supplemental intervening petition. On April 6, 1921, the St. Louis-San Francisco Railway Company filed its answer jointly to said intervening petition and supplemental intervening petition, this party being hereinafter designated as "Railway Company." On November 30, 1921, the St. Louis & San Francisco Railroad Company filed its answer to said intervening petition, this party being hereinafter designated as "Railroad Company."

## I

The intervening petition charges that the Railroad Company was at all times mentioned a common carrier engaged in the transportation of cattle from points in Texas, Oklahoma and New Mexico, to primary markets of live stock at Kansas City, St. Joseph, St. Louis, Chicago, New Orleans [fol. 127] and other points and was a party jointly or severally to the tariffs, rates, fares and charges between the points named and itemized in appendix "A" to an order of the Interstate Commerce Commission hereinafter referred to and made an exhibit to said intervention.

The allegations of paragraph 1 are admitted by the separate answers of the Railway Company and the Railroad Company.

П

That on January 12, 1924, the Interstate Commerce Commission, after full hearing, in case No. 732, directed the Railroad Company and other carriers named in said order to pay to intervener damages on account of charging the shippers named as consignors in said report and order unjust and unreasonable rates on shipments of cattle, shown in said Appendix "A" in the amounts therein named.

Said unreported opinion of the Interstate Commerce Commission being numbered A-583 and attached as an exhibit "A" to said intervention, set forth the unreasonable rates paid, the rates established by the Interstate Commerce Commission, the shipments made at said unreasonable rates, and the amount of principal and interest as damages which the railroad Company and other carriers were directed severally to pay to intervener, the amount adjudged in favor of intervener as assignee and against the Railroad Company being \$27,682.75 as principal, \$2,529.56 as interest, \$3,021.23 as attorneys' fees, and costs and interest at six per cent (6%) from August 1st, 1916.

The separate answers of the Railway Company and the Railroad Company admit the entry of the Interstate Commerce Commission order of January 12, 1914, in the amount pleaded, but deny that intervenor is the lawful assignee in respect of said damages of the consignors referred to in

said paragraph 2.

## Ш

That the damages so adjudged arose from the fact that in 1903 the Railroad Company and other connecting carriers named as defendants in said cause No. 732 and being engaged in transporting live stock between the points of origin and markets of destination set forth in Appendix "A," about March, 1903, advanced said live stock transportation rates in amounts specified in Appendix "A," which advanced rate the said consignors were compelled to pay to the Railroad Company and which advanced rates were adjudged by the Interstate Commerce Commission to [fol. 128] be unjust and unreasonable and formed the basis of the judgment in favor of intervener as assignee of said consignors, as pleaded in paragraph 2.

The separate answers of the Railway Company and the Railroad Company admit the allegations of paragraph 3.

### IV

That on February 10, 1904, The Cattle Raisers' Association of Texas, a voluntary organization of Southwestern live stock producers and shippers, filed complaint before the Interstate Commerce Commission against the Railroad

Company and other connecting carriers, maintaining said advanced rates, alleging that said advanced rates were unjust and unreasonable; that the Commission, after full hearing on August 16, 1905, by report and opinion in said cause No. 732, 11 I. C. C. 298, adjudged said advanced rates to be unjust and unreasonable, violative of Section 1 of the Interstate Commerce Act and therefore unlawful, but that no formal order was entered by the Commission because said complaint applied for more specific findings of fact, which application was held under advisement by the Commission until after the passage of the amendment to the Interstate Commerce Act known as the Hepburn Law, and effective August 28, 1906. That said advanced rates remained in effect until November 17, 1908.

The separate answers of defendants Railway Company - Railroad Company admit all the allegations of paragraph 4, save that they deny that the advanced rates were unlaw-

ful or found to be unlawful by the Commission.

# V

That on August 29, 1906, the complainant, Cattle Raisers' Association of Texas, in behalf of itself and of its members and of others engaged in raising, buying and shipping cattle between said points of origin and market filed its petition with the Interstate Commerce Commission reaffirming the allegations of its petition of February 1, 1904, and praying that the Commission proceed with such further hearing as it might deem necessary respecting the unjustness and un reasonableness of said advanced rates, that the Commission prescribe just and reasonable rates and award reparation for accrued damages; that after issue joined and full hearing, on April 14, 1908, the Commission by report and opinion, 13 L.C.C. 419, adjudged the advances and the advanced rates to be unjust and unreasonable and prescribed and fixed as just and reasonable the rates previously in effect, [fol. 129] all of said reports, opinions, orders and supplemental orders being incorporated with the intervention as exhibits.

The separate answers of defendants Railway Company and Railroad Company admit all the allegations of paragraph 5.

That the parties named as consignors in Appendix "A", as owners, shipped the cattle between the points and paid therefor to defendant Railroad Company and other named carriers, the advanced rates thereafter adjudged by the Commission to be unjust, unreasonable and unlawful, at the dates and in the amounts, all as set forth in said Appendix "A"; and that said shippers were thereby damaged to the extent of the unjust and unreasonable portion of said rates, as shown by the difference between "Rate Paid" and "Rate Ordered" in Appendix "A".

The answer of defendant Railway Company admits "that the matters and things therein stated were made and determined by the said Interstate Commerce Commission

as stated in said paragraph 6."

The answer of defendant Railroad Company makes the same admission, but denies that the Commission found said rates to be unlawful.

### VII

That the shippers named in Appendix "A" as consignors and E. B. Spiller as Secretary of the Cattle Raisers' Association of Texas and his predecessor in office, H. E. Crowley, duly filed with the Commission on account of said shippers and on account of Spiller and Crowley, as assignees, reparation claims in the amounts of unlawful charges adjudicated by the Commission in its report and order of January 12, 1914; that the claims and rights of said shippers were duly assigned to E. B. Spiller who was, at the date of said order, and now is, the legal and equitable owner thereof and entitled to recover the resultant damages, together with interest and attorneys' fees, and that the facts found by the Commission in said reports and opinions were true and correct.

The separate answers of Railway Company and Railroad Company deny the correctness of the findings of the Commission, deny the assignment to intervener of the claims and rights of said shippers and deny the title of in-

tervener as such assignee.

That said reparation order of the Commission was duly served upon the Railroad Company, which has failed and refused to pay and is now liable to intervener in the full amount of said judgment.

The separate answers of Railway Company and Railroad Company admit service of said reparation order upon the Railroad Company and that it has failed to pay the same either in whole or in part, but deny all liability of the Railroad Company to intervener thereunder.

# IX

That within one year from January 12, 1914, intervener filed his petition in the United States District Court at Kansas City against the Railroad Company and other carriers, pleading the aforesaid facts and praying judgment against the Railroad Company in the amount of said reparation award; that the railroad Company was duly served with process and appeared; that upon a jurywaived trial before the court on August 16, 1916, judgment was rendered for intervener and against the Railroad Company in \$30,212,31 with interest at six per cent from August 1, 1916, and for \$3,021.23 as attorneys' fees, taxed as costs, said judgment being attached as an exhibit to the intervention; that no part of said judgment was paid and that the Railroad Company and other carriers appealed therefrom to the United States Circuit Court of Appeals for the Eighth Circuit, which tribunal on March 11, 1918, reversed said judgment and remanded said cause for a new trial in the District Court, a copy of said judgment being attached as an exhibit to the intervention; that in due time, intervener appealed by certiorari to the United States Supreme Court, which tribunal on May 17, 1920, reversed the judgment of said Court of Appeals, affirmed the judgment of said District Court, with costs, and remanded the cause, a copy of said judgment being attached as an exhibit to the intervention; that on July -, 1920, intervener duly applied to said District Court for allowance of ad ditional attorneys' fees, occasioned by said appeal, which application was sustained on July 10, 1920, the total attorneys' fees adjudged against the Railroad Company and taxed as costs in said cause amounting to \$4,586.32, a copy of said order being attached as an exhibit to the intervention; that the Railroad Company has paid a part of the costs so taxed, including \$3,351.00 as part of said attorneys' fees, leaving an unpaid balance of \$30,212.31 with interest [fol. 131] at six per cent from August 1, 1916, and also unpaid balance of costs amounting to \$1,235.00.

The separate answer of Railway Company admits the allegations of paragraph 9, save that it denies that it has paid a part of the costs taxed against the Railroad Company, including \$3,351.00 as part of attorneys' fees, leaving a balance of \$30,212.31, with interest at six per cent from August 1, 1916, and also a balance of \$1,235.00 unpaid costs; said answer admits that certain sums were paid as attorneys' fees or costs in said cause, pursuant to the term of the bond given by defendant to secure costs.

The separate answer of defendant Railroad Company admits the allegations of paragraph 9, save that it denies that it has paid a part of the costs taxed against it in said cause, including \$3,351.00 as part of the attorneys' fees.

#### 7.

That subsequent to the collection by Railroad Company of said excess charges, at all times down to the appointment of Thomas H. West and Benjamin L. Winchell as its receivers, it had in its treasury an amount of money equal to or in excess of said total excess charge collections; that during the same period the gross receipts of Railroad Company exceeded its actual operating expenses and that this condition has continued since the appointment of receivers; that since the collection of said excess charges, the Railroad Company has paid large sums in excess thereof as interest on mortgage indebtedness and has expended large sums greatly in excess of said excess charges for betterments and improvements; that upon appointment, said receivers received from Railroad Company as shown by their filed inventory over \$300,000,00 in cash; that the earnings of Railroad Company from time of collection of said excess charges down to appointment of receiver were largely in excess of operating expenses, eliminating all

items except current receipts and current expenses; that the moneys paid by shippers in excess of the rates adjudged by the Commission to be reasonable constituted an illegal exaction and belonged to the shippers after payment as it did before; that it was a part of the money in the treasury of the Railroad Company which passed to the receivers; that said money was not subject to the liens of mortgages or other written obligations of Railroad Company and that intervener's claim is prior in lien and superior in equity to the liens and claims of all bondholders, trustees, [fol. 132] mortgagees, and other claimants against Railroad Company; that it became and was the duty of Railroad Company and of its receivers and of Railway Company to repay to intervener the amount of said judgment,

interest, costs, and attorneys' fees.

The separate answer of Railway Company denies that subsequent to the collection of said charges by Railroad Company there was at all times in its treasury down to the date of the appointment of said receivers an amount of money equal to or in excess of the aggregate of intervener's claim; denies that the gross receipts of Railroad Company from the time of the collection of said charges to the appointment of said receivers were in excess of its actual operating expenses, and that since the appointment of said receivers the gross receipts have continuously been in excess of Railroad Company's actual operating expenses; admits that since the collections of said charges Railroad Company has paid large sums in excess thereof by way of interest on its mortgage indebtedness and for betterments and improvements; admits that when said receivers were appointed they received from Railroad Company in cash over \$300,000.00; denies that the earnings of Railroad Company, eliminating all items except current receipts and current expenses, from the time said charges were collected to the appointment of said receivers were largely in excess of Railroad Company's operating expenses; denies that the money so paid by said shippers in excess of the reasonable rates as fixed by said Interstate Commerce Commission was an illegal exaction, or that said money belonged to said shippers after payment thereof the same as it did before such payment; denies that it was part of the money in the treasury of Railroad Company which passed to said Receivers; denies that said money was not in any way subject to any liens of the mortgages or other instruments of writing executed by Railroad Company; denies that intervener has a claim prior in lien or superior in equity to the liens and claims of any and all of the bondholders, trustees and mortgagees, and other claimants, holding claims and demands against Railroad Company; denies that it became and was the duty of Railroad Company and of said receivers and of Railway Company to repay to intervener the amount of said judgment, interest and costs.

The separate answer of Railroad Company differs from the foregoing only in alleging a lack of knowledge as to whether the gross receipts have exceeded operating ex-

penses since the appointment of receiver.

[fol. 133] XI

That article 9 of the final decree entered in the receivership cause provides that the purchaser at foreclosure sale, his successors and assigns, shall take and receive the property foreclosed upon express condition to pay, satisfy and discharge any unpaid claims against Railroad Com pany which have been or shall be admitted or adjudged to be prior in lien or superior in equity to the refunding mortgage or the general lien mortgage and that upon refusal to so pay, the claimant, upon notice, may apply to the District Court for enforcement of his claim against the property sold; that "all questions not hereby disposed of are reserved for future adjudication;" that by order entered January 29, 1918, the court reserved jurisdiction to determine questions and rights thereafter presented; that intervener's judgment is prior in lien and superior in equity to the refunding and general lien mortgages; that Railway Company is the purchaser of the properties of Railroad Company under foreclosure sale, whereby it acquired all moneys in the hands of the receivers; that intervener has made due demand upon Railway Company, which has refused to pay; that intervener has given due notice to Railway Company of its intention to file this intervention.

The separate answer of Railway Company admits the portions of the final decree as pleaded, but refers the entire decree to the court for interpretation, denies that in-

tervener's judgment is prior in lien or superior in equity to said refunding and general lien mortgages; admits that Railway Company is the purchaser under said decree; denies that intervener has made due demand.

The separate answer of Railroad Company is identical with the foregoing, save that it avers a lack of knowledge as to demand alleged by intervener.

#### IIX

That Railroad Company, its receivers, all parties to this cause, and Railway Company prior to foreclosure sale had full knowledge and notice of intervener's claim as prosecuted, and that said claim was prior in lieu and superior in equity to said refunding and general lien mortgages and all other liens and claims against Railroad Company; that neither intervener nor his attorney had knowledge or notice of orders fixing the time for filing of claims herein, nor of the final decree in this cause, prior to the presentation [fol. 134] in August, 1916, of objections to confirmation of sale, at which hearing intervener's attorneys appeared and notified the attorneys for the Reorganization Committee and for the purchaser and for Railway Company and for Railroad Company and for the Guaranty Trust Company and for the Bankers' Trust Company, and for all other parties, of the judgment entered August 16, 1916, in the Federal Court at Kansas City, and that intenvener would claim the same to be prior in lien and superior in equity to all other liens and claims against Railroad Company's property; that intervener and his attorneys first learned of the orders fixing the time for claims after said time had expired on February 1, 1916; that intervener prosecuted his claim in the Federal Court at Kansas City because required so to do by Section 16 of the Interstate Commerce Act, that being the only remedy open to intervener; that the Commission's order of January 12, 1914, was duly served upon Railroad Company; that receivers were appointed in this cause in May, 1913, and they, therefore, had knowledge of the judgment obtained be intervener against Railroad Company, which appeared in said cause by the same attorneys acting for said receivers, actively defended the same, took an appeal to the Court of

Appeals and prosecuted the same vigorously and likewise appeared before the Supreme Court; that Railroad Company gave an appeal bond for costs and that Railway Company has paid to intervener a part of said costs; that receivers were appointed herein on petition of bondholders on May 22, 1914, and were in charge of Railroad Company's property when intervener brought suit at Fort Worth Texas, to recover under reparation award: that said suits were dismissed because all the railroad companies, including Railroad Company, objected to the jurisdiction and to avoid question, intervener filed said suit at Kansas City against all carriers affected and a separate suit in this court against Railroad Company, which last suit was dismissed after judgment rendered in the joint suits at Kansas City; that service of process in the suit at Kansas City was first had upon agents of the receivers and the Railroad Company appeared specially to object thereto; whereupon further service was had upon Railroad Company; that the efforts of Railroad Company and its receivers and Railway Company to defeat intervener's claim prevented its reduction to judgment in time for presentation of said demand in this cause within the time prescribed by this court; that the object of said order, fixing time for claims, was fully attained by the actual notice and knowledge received [fol. 135] by Railroad Company, its receivers, and all parties and attorneys in this cause, concerning the existence and prosecution of intervener's claim; that at the August, 1916, hearing, intervener gave full notice of his claim to attorneys for Reorganization Committee and to the purchasers of the property; that no person or party to this cause has offered to make any payment or settlement with intervener on account of his claim and that Railway Company, Railroad Company, its trustees, bondholders and stockholders have had full knowledge and notice of the fact and nature of intervener's claim.

The prayer is for permission to file the intervention, for an order of reference, and for judgment in \$30,212.31, with interest at six per cent from August 1st, 1916, for costs, including \$1,235.00 attorney's fees, for adjudication as prior in lien and superior in equity to the refunding and general lien mortgages of Railroad Company, and for en-

forcement, unless paid, against the property sold to Rail-

way Company.

The separate answer of Railroad Company denies knowledge and notice of intervener's claim prior to foreclosure sale and confirmation; pleads a lack of knowledge as to the knowledge thereof by receivers; denies that it or its receivers or the Railway Company had knowledge of the paramount priority of intervener's claim and denies the fact of same; denies that intervener and his attorneys did not learn of court orders prescribing time for claims soon enough to comply; denies that intervener and his attorneys had no knowledge or notice of the final decree prior to its entry or the sale thereunder; denies that they first received such knowledge and notice in August, 1916; denies the giving by intervener's attorneys of the notices alleged on that date; denies that intervener and attorneys first learned of order regarding claims after their time limit had expired; admits that intervener was prosecuting his suit at Kansas City; but avers he had full opportunity to file claim in this cause; denies that intervener's only remedy was that prescribed by Section 16 of the Interstate Commerce Act; admits that receivers were appointed in May, 1913; denies that Railroad Company, by the same attorneys who acted for the receivers, defended the suit at Kansas City and appeared for Railroad Company in the appellate proceedings; admits that a portion of the costs have been paid; admits that on May 22, 1914, the receivers were in charge; admits the institution and dismissal of the Fort Worth suit, the institution of suit at Kansas City, the in-[fol. 136] stitution and dismissal of suit in this denies that intervener's failure to file demand in this cause was due to the efforts of Railroad Company, its receivers and Railway Company; denies that the object of the order prescribing the time for claims has been satisfied by the actual notice and knowledge alleged; denies the notices alleged to have been given by intervener at the August, 1916, hearing; admits that no effort has been made to settle intervener's claim; denies that the mortgage trustees, bondholders, stockholders, Railway Company, and Railroad Company have had full knowledge and notice of the pendency and nature of intervener's claim.

The separate answer of Railroad Company is identical with foregoing, save that it confines to Railroad Company its specific denial of knowledge of the priority of intervener's claim and that it avers a lack of knowledge as to the notices alleged to have been given at the August, 1916, hearing; and that it avers a lack of knowledge as to efforts made by Railway Company or others in settlement of intervener's claim.

Both answers specifically deny that intervener's claim is prior in lien or superior in equity to the refunding mortgage and general lien mortgage of Railroad Company.

# Supplemental Intervening Petition

The supplemental intervening petition filed March 10th, 1921, seeks recovery of the attorneys fees adjudged in the Kansas City suit, upon the following additional grounds for preferential allowance:

That the Receivers appointed in this cause were formally directed to defend all suits against Railroad Company, including interevener's Kansas City suit that by direction of the Receiver their counsel defended said suit for Railroad Company and appealed same to Court of Appeals and defended same in the Supreme Court; that the receivers furnished the appeal bond for Railroad Company in \$3,500, and indemnified surety against loss; that the adjudged attorneys fees, taxed as costs, amounted to \$4.586.32; that to relieve the surety under indemnity agreement the receivers paid the Clerk's costs and \$3,351.19 of attorneys' fees leaving unpaid balance due of \$1,235.13; that said attorneys' fees were costs incurred through receivers litigation of the cause and that Railroad Company and receivers should be required to pay said balance of attorneys' fees remaining unpaid. The prayer is for order on receivers to pay said balance of \$1,235.13.

[fol. 137] The separate answer of Railway Company denies the alleged order of Court for defense by receivers of suits against Railroad Company, pleads a lack of knowledge as to receivers having directed their counsel to defend said cause; denies that receivers procured cost bond on appeal, and that they indemnified surety; admits amount of

attorneys' fees adjudged as \$4,586.32; denies that receivers paid costs to extent of bond; admits payment of certain costs; denies that balance of \$1,235.13 as unpaid costs remains; denies that attorneys' fees were occasioned by action of receivers and that Railroad Company and receivers should be required to pay same.

#### General Defenses

The Seperate Answer of Railway Company sets up four pleas in bar.

- 1. That intervener's claim arose between August 1906 and November 1908; that receivers of Railroad Company were appointed herein May 27th, 1913; that the interlocutory decree herein prescribed the time for filing claims which was subsequently extended to February 1st, 1916; that intervener's claim was established by the Interstate Commerce Commission long prior to said date but was never filed in this cause.
- 2. That intervener's claim arose prior to entry of Final Decree herein which decree adjudged that notice for presentation of claim had been given; that time of presentation had expired; and that no claim of this character which had not been filed should be enforceable against the receivers or the purchasers of the property, nor entitled to the benefits of Article IX, nor allowed to share in distribution of proceeds of sale.
- 3. That intervener instituted suit on this same claim in this Court on January 11, 1915, whereunder issue was joined; that the cause was continued from time to time, dismissed on March 19th, 1917 for want of prosecution, reinstated March 22nd, 1917 on Intervener's motion, and finally dismissed for want of prosecution December 6th, 1918; and that intervener's failure to maintain and prosecute said suit estops and precludes the prosecution of the present demand.
- 4. That the receivers were discharged January 29th, 1918 by an order adjudging that all claims against the receivers or the Railroad property arising out of the re-[fol. 138] ceivership should be filed by September 1st, 1918

and not thereafter, and that the rights of any claimants failing to so file interventions should cease and determine as to said Railroad property and its purchaser; and that intervener's failure to comply with said order bars this action.

The separate answer of Railway Company further avers that the charges sought to be recovered were collected between August, 1906 and November 1908; that said moneys were disbursed by Railroad Company for current operating expenses long prior to May, 1913 and that no part of such sums remained in the treasury and ever passed into the possession of the receivers.

That the charges in question were collected at regular tariff rates then prescribed by duly published tariffs applicable to such shipment and were the only legal charges

which Railroad Company could lawfully collect.

That the final decree, order of sale and order confirming sale, as entered herein, constitute a contract between this Court and Railway Company which would be violated by any judgment entered herein for intervener, to the damage of Railway Company its bondholders and creditors.

That intervener's failure to file claims herein within time prescribed constitutes laches barring its present considera-

tion.

That in any event, intervener's claim should be allowed only as that of a general unsecured creditor without priority over the mortgage indebtedness and without constituing a charge against the property of Railway Company acquired at the foreclosure sale of Railroad Company.

The separate answer of Railroad Company differs from

the foregoing only in the following respects:

That it omits the fourth plea in bar above stated; that it does not purport to answer and is not directed against the supplemental intervening petition of intervener; and that it omits to allege the defense claiming that the court receivership orders constitute a contract between the court and Railway Company, which would be violated by allowance of intervener's claim.

Both answers pray for dismissal of the intervention or, in the alternative, that the same be allowed only as a general unsecured creditor's claim against Railroad Company.

[fol. 139] Synopsis of Pleadings of E. B. Spiller, et al. Intervention

This proceeding was institued by E. B. Spiller, Bailey & Townsend, Baker & Brown, W. M. Barringer, Battles & Denton, G. W. Battles, F. X. Belshe, Boedecker & Ball, T. J. Brown, Cain & Kelley, Thomas Chism, Tom Durant, S. H. Elliott, R. M. Evans, C. J. Fogleman, R. L. Hall, J. R. Hamilton, Haynes & Hogenkamp, Hensley & Brumit, Hodges & Payne, G. W. Jackson, R. H. Jackson, James & Cardin, James & Jamison, J. E. Kelley, Kimble & Co., King Bros., Lance & Charley, Murrell & Clary, W. L. Payne & Son, J. J. Pickens, F. B. Severs, T. J. Smith, Cal Stewart, R. W. Stubblefield, Three Circle Ranch, N. T. Trout, Frank Vincent, Wall & McFish, O. G. Warren, H. Willis, W. D. Woods, J. A. Wynne, Yohoko Farm & Stock Co., against the various parties complainant and defendant in the above entitled cause and against the Railway Company and against the receivers of the Railroad Company by the filing on December 2nd, 1920 of an intervening petition upon leave of Court granted upon formal application, due notice and full hearing. On March 10th, 1921 said interveners filed a separate and supplemental intervening petition; on April 6, 1921 the Railway Company filed its answer jointly to said intervening petition and supplemental intervenuig petition; and on November 30th, 1921 the Railroad Company filed its answer to said intervening petition. The pleadings upon this intervention so closely parallel those filed upon the intervention of E. B. Spiller alone that reference may properly be made to the full synopsis upon that intervention as hereinbefore set forth and attention now directed only to the points of variance. Aside from E. B. Spiller, the remaining interveners sue directly in their personal rights as consignors of live stock seeking to recover individually the excess of charges collected upon their individual shipments together with interest thereon from June 15, 1914, attorneys' fees and costs. E. B. Spiller sues as assignce of five shippers who assigned their claims to him after rendition of the reparation award by the Interstate Commerce Commission. The historical allegations reciting the various steps taken following publication of the advanced live stock rate by the carriers are substan-

tially identical with those given in connection with the E. B. Spiller intervention down to and including the recovery of judgment by interveners in the Federal Court at Kansas City. Thereupon, the intervening petition avers, the parties agreed that said cause should remain in statu quo and [fol. 140] abide the decision of the companion cause wherein E. B. Spiller alone was plaintiff and wherein an appeal was taken to the Court of Appeals and certiorari subsequently granted to the Supreme Court. The present intervention recites the history of the appeals taken in said companion case and resulting, by virtue of said agreement. in the judgment being made final in the case wherein these interveners were the plaintiffs. Absent such appeal, this intervention naturally lacks allegations as to application being made for the allowance of additional attorneys' fees. The prayer is for allowance of the total of intervener's claim, \$3,652.97 with interest at 6% from August 1st, 1916. attorney's fees \$365.29 and costs. The separate answers of Railway Company and Railroad Company are substantially identical with those filed upon the companion intervention of E. B. Spiller, save for an allegation of lack of knowledge by defendant Railway Company as to any stipulation being entered into between counsel for interveners and counsel for receivers that itnervener's Kansas City suit should be stayed to abide the result in the companion and appealed case.

# Findings of Fact

In 1903, the defendant, St. Louis & San Francisco Railroad Company, together with other railroad companies, advanced their rates on cattle shipments from the State of Texas and other states in the southwest to Kansas City, Chicago, St. Louis and other primary markets, three cents per hundred pounds, duly publishing the new rate in accordance with the Act to Regulate Interstate Commerce.

In February, 1904, the Cattle Raisers Association of Texas, by a petition filed with the Interstate Commerce Commission, challenged this advance in the rates as unreasonable, unjust and unlawful. On August 16, 1905, the Interstate Commerce Commission (11 I. C. C. Reports) after a full hearing upon due notice to the defendant and other carriers, sustained the contentions of the Cattle

Raisers Association of Texas and found that the rate, to the extent of the increase—to-wit, three cents per hundred pounds, was unreasonable, unjust and therefore unlawful, and that the defendant and said other carriers should be required to desist from the maintenance of that rate. The finding and conclusion of the Interstate Commerce Commission in that regard is as follows:

"It has been found that the advances made during the year 1903, as shown by the appendix, were unjust and unreasonable, and that the present rates are unjust and unfol. 141] reasonable by the amount of said advances. The defendant should, therefore, be required to cease and desist from the maintenance of these rates \* \* \*. All questions of reparation are reserved."

On November 18, 1905, the Cattle Raisers' Association of Texas filed with the Interstate Commerce Commission a motion for additional and more specific findings. This motion was pending and had not been acted on when the petition to re-open the case, August 29, 1906, was filed. At the time the Interstate Commerce Commission handed down its report, findings and opinion—to wit, August 16, 1905, it was without power to prescribe rates for the future. One June 29, 1906, the Act to Regulate Commerce was amended by what is known as the Hepburn Bill and this power to prescribe rates was conferred upon the Interstate Commerce Commission.

Subsequent to the taking effect of this amendment, and on August 29, 1906. The Cattle Raisers' Association of Texas filed a petition to re-open the case and praying in substance that the Interstate Commerce Commission proceed in the case, started in February, 1904, to the making of an order under the fifteenth section of the Act to Regulate Commerce as amended June 29, 1906. The defendant railroad company and the other carriers thereupon attacked the jurisdiction of the Interstate Commerce Commission to make an order under the fifteenth section of the Act to Regulate Commerce as amended June 29, 1906. The Interstate Commerce Commission overruled this contention by its order made November 14, 1906, and ordered the case set down for further hearing, giving both The Cattle Raisers' Association of Texas and the carriers an ap-

portunity to offer such additional testimony as either might desire.

On April 14, 1908, the Interstate Commerce Commission. after taking additional testimony, reaffirmed its decision of August 16, 1905, and pronounced the rates therein condemned as unreasonable and unlawful, to be still excessive and unreasonable, and made its order prescribing the rates for the future accordingly, which rates took effect November 17, 1908. Questions as to reparation were reserved by the Interstate Commerce Commission to be dealt with as specific claims where presented. In the meantime and on the — day of —, 1908, the defendant and other carriers applied to the Circuit Co n of the United States for the Eastern District of Missouri for an injunction against said order, which had a full hearing and was refused by the de-[fol. 142] cision of the Circuit Court, three judges sitting. on the - day of ---., 1911. Soon thereafter the claimants, Spiller and others, brought on for hearing their claims for reparation which the Commission heard from time to time. All said claims having been filed within the time prescribed by the act, but no action thereon was deemed proper pending the injunction case. The reparation case was proceeded with continuously and without unnecessary delay.

After a number of hearings and checking and rechecking claims, finally, on January 12, 1914, the Interstate Commerce Commission, in a supplemental report, made an order by which it ordered and directed the defendant railroad company to pay to the intervenor E. B. Spiller, assignee of a large number of shippers of cattle, the sum of \$27,682.75, that being the amount which the defendant had illegally exacted from the assignors of said Spiller, plus interest to June 15, 1914, and to pay to the shippers whose names were set out in the appendix to said supplemental report, and who had not assigned their claims to Spiller, the amount set opposite their names, together with the interest set out in said appendix. The aggregate of the amounts ordered paid to the individual shippers who had not assigned their claims, amounted, with interest to June 15, 1914, to \$3,244.61.

On May 27, 1913, on the bill of complaint of North American Company, a general creditor, receivers were appointed for the defendant railroad company and took over the

management and operation of said defendant's properties. After the appointment of the receivers on May 27th, and after January 12, 1914, and within the time prescribed by the Act to Regulate Commerce, the order of reparation made by the Interstate Commerce Commission in favor of the intervenors was served upon the defendant railroad company and its receivers. The defendant railroad company and its receivers refused to comply with the order of reparation and refused to pay the intervenors the moneys which the Interstate Commerce Commission had ordered it to pay and which it had illegally and unlawfully exacted from them. It should be stated that the order of reparation gave the defendant and other carriers six months within which to pay the moneys therein ordered paid. After the refusal of the defendant to pay the amount ordered paid by the Interstate Commerce Commission, and within the time prescribed by the Act to Regulate Commerce, to-wit-on December 29, 1914, and in accordance with section sixteen of said Act, the intervenor E. B. Spiller filed suit in the Dis-[fol. 143] triet Court of the United States for the Western Division of the Western District of Missouri against the defendant, and said other carriers, to enforce the payment by the defendant of \$27,682.75 which was the amount, principal and interest, that the Interstate Commerce Commission had ordered the defendant to pay as aforesaid, together with interest thereon from June 15, 1914. This suit was entitled E. B. Spiller, Plaintiff, v. Missouri, Kansas & Texas Railway Company, et al., Defendants, No. 4308.

The other intervenors, on the same date, also commenced suit in said District Court of the United States for the Western Division of the Western District of Missouri, against the defendant railroad company and other carriers to compel the defendant company to pay to them the amounts which the Interstate Commerce Commission had ordered said defendant to pay. This suit was entitled, E. B. Spiller, et al., v. Missouri, Kansas & Texas Railway Com-

pany, et al., No. 4320.

The attorneys employed and paid by the receivers, appointed as aforesaid, appeared specially in these cases and moved that the service be quashed claiming that service of summons had been had upon the agents of the receivers at Kansas City, and not upon the agents of the defendant railroad company. W. F. Evans, General Solicitor for the receivers of the railroad company, in association with the district attorneys for the receivers, appeared in this motion for the defendant.

Suits were also filed in the District Court of the United States at Fort Worth, the petitions being similar to the petitions filed in the District Court of the United States at Kansas City except that the receivers of the defendant were also made parties defendant.

On the 2d day of November, 1914, the receivers, W. B. Biddle, J. W. Lusk and W. C. Nixon, through their attorneys, W. F. Evans and others, filed a plea in abatement in those cases.

Similar suits were also filed in the District Court of the United States at St. Louis against the defendant railroad company in order to prevent any possibility of the running of the statute of limitations prescribed by the Act to Regulate Commerce.

In the suits brought in the District Court in St. Louis, the defendant railroad company was sole defendant. suits at Kansas City the defendant railroad company was [fol. 144] sued jointly with the other carriers against whom orders of reparation had been made,

Afterwards, the defendant railroad company, through its attorneys who were the attorneys for the receivers, entered its appearance in the suits in the District Court at Kansas City and the cases at [Forth] Worth and St. Louis were allowed to drop, the latter case being finally dismissed for want of prosecution. The cases in the District Court of Kansas City proceeded to trial and on August 16, 1916, the intervenor E. B. Spiller recovered judgment against the defendant railroad company in Cause No. 4308 in the sum of \$30,212.31 with interest thereon from August 1, 1916, at the rate of six per cent per annum until paid, and also judgment for \$3,021.23 as attorneys' fees to be taxed as costs.

On the same date and in the same court, the intervenors, E. B. Spiller, et al., recovered a total judgment of \$3,658.55, with interest thereon from August 1, 1916, until paid and also a judgment of \$364.63, attorneys' fees to be and which were taxed as costs.

The defendant railroad company appealed by writ of error from said judgment on August 28, 1916, to the Circuit

Court of Appeals for the Eighth Circuit. The petition for the writ of error was filed on August 28, 1916, by W. F. Evans and Cowherd, Ingram & Durham, attorneys employed and paid by the receivers of said defendant railroad company. These attorneys received no other compensation

than that paid to them by the receivers.

At the time this appeal was taken to the Circuit Court of Appeals for the Eighth Circuit, a stipulation was entered into by and between the intervenors, and defendant and other carriers, under which no appeal was to be taken in cause No. 4320, E. B. Spiller, et al., v. Missouri, Kansas & Texas Railway Company, et al., but that the judgment in that case should abide the result of the final judgment in Cause No. 4308, E. B. Spiller v. Missouri, Kansas & Texas Railway Company, et al. On September 8, 1916, an appeal bond was filed in Cause No. 4308 in the penal sum of \$3,-500,00. This bond was executed by the St. Louis & San Francisco Railroad Company as principal, by its attorneys. Cowherd, Inghram & Durham and by the United States Fidelity & Guaranty Company as surety, and was obtained by the receivers.

All of the steps taken to perfect the appeal from the indement of the District Court of the United States for the Western Division of the Western District of Missouri were [fol. 145] taken by the attorneys employed and paid by the receivers up until the time the properties of the railroad company in the hands of the receivers were turned over to the St. Louis-San Francisco Railway Company, which was on or about November 1, 1916. From that date, to-wit-November 1, 1916, the attorneys for the railway company, employed solely by the railway company, handled the case for the railroad company.

The order appointing the receivers made May 27, 1913,

provided:

"They (referring to the receivers appointed in the order) are authorized and directed to collect all moneys due and all moneys to become due to said company, to institute and prosecute such suits in their own names as receivers or in the name of the company, as their attorney may advise, to defend such suits as may be brought against them and those now pending or hereafter brought against the company

which affect or may affect the property of which they are now or may become receivers."

On October 29, 1917, the Circuit Court of Appeals for the Eighth Circuit reserved the judgment of the District Court of the United States for the Western Division of the Western District of Missouri rendered in favor of E. B. Spillery. Missouri, Kansas & Texas Railway Company, et al., in said Cause No. 4308, and remanded the case for a new trial This judgment, as to some of the grounds for a reversal. was modified on March 11, 1918, and on March 27, 1918, the

mandate of the Circuit Court of Appeals was filed.

Thereupon, intervener E. B. Spiller appealed by writ of certiorari from the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, to the Supreme Court of the United States. On May 17, 1920, the Supreme Court of the United States reversed said judgment of the United States Circuit Court of Appeals for the Eighth Circuit and affirmed the judgment of said District Court of the United States for the Western Division of the Western District of Missouri. The mandate of the Supreme Court of the United States was filed on June 6, 1920, in the office of the Clerk of the District Court for the Western Division of the Western District of Missouri.

In July, 1920, intervener E. B. Spiller his application or motion for additional attorneys' fees in the District [fol. 146] Court of the United States for the Western Division of the Western District of Missouri in said Cause No. 4308, and on the 20th day of July, the Court entered judgment allowing said intervener, as an additional attorneys' fee, \$1.654.09 and taxed the same as costs making the total of the attorneys' fees allowed and taxed as costs the sum

of \$4,675.32.

Prior to August 29, 1916, neither interveners nor their attorneys had had any notice or knowledge of any order made by the court fixing the time within which claims could be filed in this cause and in this court. publication was made as required by the orders. On that date, the attorneys for the interveners, by searching the records in this cause, learned for the first time that such an order has been made and that the time fixed by the order had expired. On August 29, 1916, the matter of the

hearing of the application for a confirmation of the sale by the Special Master of the properties of the defendant railroad company was up for hearing in this court before His Honor, Judge Sanborn. The attorneys for the receivers, for the re-organization managers and other parties in interest were present in court. In open court the attorneys for the interveners gave notice that interveners had a claim against the defendant railroad company for illegal freight exactions, that their claims had been reduced to judgment in the District Court of the United States for the Western Division of the Western District of Missouri. that an appeal was being taken from said judgment by the defendant railroad company and other carriers and that the contention of the interveners was that their claims were prior in right and superior in equity to the claims of all other creditors, including bondholders. Thereafter, and upon the same date, a written notice was served upon Honor le Henry W. Taft, attorney for the reorganization committee and the St. Louis-San Francisco Railway Company and others, also upon W. F. Evans, the attorney for receivers and attorney for the St. Louis-San Francisco Railway Company and also upon other attorneys representing other parties in interest. This notice recited the recovery of the judgments by the interveners. the nature of interveners' claims, that no notice of any of the proceedings in this cause had ever come to the knowledge of the interveners, the knowledge of the receivers of the existence interveners' claims, the participation by the attorneys of the receivers in the defense of the cases against the defendant railroad, the failure of the receivers to list the claim of the interveners, as required by the final decree, that the claim of the interveners was prior in right and superior in equity to the claims of all other creditors [fol. 147] of the defendant railroad and that interveners would assert their rights of payment against the St. Louis-San Francisco Railway Company which had been organized to purchase the property of the defendant railroad.

Speyer and Company and J. & W. Seligman and Company of New York were the reorganization managers of the St. Louis & San Francisco Railroad Company. They prepared and filed in this court a plan of reorganization which, with the exception of a modification required by

the Public Service Commission of Missouri, was carried out and consummated. The general scheme of this plan was that the new company, the St. Louis-San Francisco Railway Company, was to be organized to take over the properties of the defendant railroad. These properties were to be sold by a Master at foreclosure sale. consisting of prior lien bonds secured by first mortgage on all the properties of the reorganized company, adjustment mortgage bonds secured by mortgage on the properties of the reorganized company but subject to the mortgage securing the prior lien bonds, income mortgage bonds, secured by mortgage on all the properties of the reorganized company but subject to the prior lien mortgage and the adjustment mortgage, and preferred stock and common stock. were provided for. The securities of the new company were to be exchanged for the securities of the old. Part of them were to be used to satisfy the claims of general creditors. Under the plan the holders of the five millon dollars of first preferred stock of the old company and the holders of sixteen million dollars of second preferred stock of the old company were to receive a bonus in preferred and common stock in the new company. The Publie Service Commission of Missouri refused to approve that part of the plan and the plan was modified and under the plan as modified, the holders of five million dollars of first preferred stock of the railroad company were to receive, and did receive, five million dollars of the new common stock, the holders of the sixteen million dollars of second preferred stock of the old company were to receive, and did receive, sixteen million dollars of the common stock of the new company and the holders of the twenty-nine million dollars of common stock of the old were to receive, and did receive, \$24,650,000.00 of the common stock of the new company. In other words, the stockholders of the old company were to receive, and did receive, \$45,650,000.00 of the stock of the new company as representing their equity in the properties without payment of anything by them therefor.

[fol. 148] The fact that under the plan, these stockholders were required to buy \$50.00 worth of the prior lien bonds for each share of stock does not affect the situation. These bonds were secured by a first mortgage on all of the prop-

erties of the reorganized company and presumptively were

worth par.

In the application filed by the reorganization managers and by the St. Louis-San Francisco Railway Company with the Public Service Commission for authority to issue securities, it was stated and shown that the value of the railroad properties and of properties not used for railroad purposes and the cash to be received from the receivers was \$321,776,000.00. This was the value accepted and found to exist by the Public Service Commission of Missouri, and is accepted as the value of such properties by the Master. The total of the securities, bonds, preferred stock and common stock of the new, or St. Louis-San Francisco Railway Company, to be issued under the plan as authorized by the Public Service Commission, was \$321,-688,886,00, or so much thereof as might be necessary.

No offer was ever made by the railroad company or the receivers, or by anybody else to pay the claims of interveners and no tender of any payment either in money or otherwise was ever made by any one to them. On the contrary, the railroad company, the receivers and the railway company, through their attorneys, have constantly since the making of the order of reparation by the Interstate Commerce Commission in 1914, and prior thereto, contested every effort made by interveners to establish their claims. The interveners have from the beginning shown the utmost diligence in the prosecution of their claims and

have been guilty of no laches.

On December 2, 1920, the interveners applied to His Honor, Judge Walter H. Sanborn for leave to file their intervening petitions herein. On February 12, 1921, Judge Sanborn granted said applications, his order in that regard in Case No. 4308, being as follows:

"Upon consideration of the application of E. B. Spiller for leave to file intervening petition herein, which was verified December 2, 1920, and of the argument of the counsel for the respective parties upon the hearing of this application, it is hereby

Ordered that the application be granted; that the applicant have leave to file his petition; that the St. Louis and San Francisco Railway Company answer the petition or take such other action against it as it may be advised [fol. 149] within twenty days after the service of this order by its attorneys, and that the issues raised by the intervention be and they are hereby referred to the Special Master for hearing, consideration, report of the facts and his conclusions."

The order of Judge Sanborn in Case No. 4320 is the same. The opinion of Judge Sanborn on the applications of the interveners for leave to file intervening petitions is as follows:

"In view of the opinion in Love vs. North American Company, 229 Fed. 123, and of the averments of the applicants that on account of the necessity of first establishing their claims by the findings and orders of the Interstate Commerce Commission, they could not have enforced them in the foreclosure proceeding at any time before February 1, 1916, the limit of time fixed for presenting claims by the orders in those proceedings, and that they have been diligently establishing these claims by necessary litigation before the Interstate Commerce Commission, the District Court and the Supreme Court, and that they notified the attorneys for the purchasers at the foreclosure sale before they paid for their purchase of their claims and of their intention to press them, the court is not persuaded that they are barred in this Court of Equity from a presentation and consideration of their claims either by the orders limiting the time within which claims were to be presented in the foreclosure proceedings or by the inexcusable laches of the applicants."

As stated above, the Interstate Commerce Commission on August 16, 1905, found that the rate published in 1903 was unjust and unreasonable to the extent of three cents per hundred pounds. On April 14, 1908, the Interstate Commerce Commission reaffirmed this finding. From August 16, 1905 until the new rate fixed by the Interstate Commerce Commission in April, 1908, went into effect, which was in November, 1908, the defendant railroad company continued to exact from interveners and their assignors the rate which was, and had been found to be, unreasonable, unjust and unlawful. All of the items of the exactions involved in interveners' claims were exacted by the

railroad company between August 16, 1906, and the date when the rate fixed by the Interstate Commerce Commission for the future went into effect, that is November 17, 1908. This new rate was the rate that existed prior to the increase in 1903 of three cents per hundred pounds. Therefore, all of the items of interveners' claims were exacted in the face of the positive finding of the Interstate Comfol. 150] merce Commission that they were unjust and unreasonable and therefore unlawful.

From June 29, 1906, until May 27, 1913, the date when receivers were appointed herein on the bill of complaint of the North American Company, a general creditor, the net operating income of the railroad company was \$92,471,-350.28. In other words, the operating income exceeded the operating expense, including taxes, by that sum. From July 1, 1912, to May 27, 1913, operating income exceeded operating expenses, including taxes, by \$11,752,379.60. In fact, there was not a year from June 30, 1906 to May 27, 1913, except the year ending June 30, 1908—when the operating income exceeded operating expenses, including taxes, by \$9,944,600.89—that the operating income did not exceed the operating expenses including taxes by over \$11,000,000,000.00.

Foreclosure proceedings by the bondholders were first started May 22, 1914, or nearly one year after the receivers were appointed on the bill of complaint of the general creditor, North American Company. From May 27, 1913 to April 30, 1914, the operating or current receipts exceeded the operating expenses, including taxes, by \$12, 930,858.89, the earnings being during said period \$48,-380,219.16 and the operating expenses being \$35,449,360.17. During every year from June 30, 1906 to May 27, 1913, the defendant company paid large sums in excess of the excess charges collected from interveners and their assignors, by way of interest on its mortgaged indebtedness and for betterments and improvements to its railroad and equipment and by way of purchase of new equipment. From May 27, 1913, to May 22, 1914, the receivers paid out large sums by way of betterments to road and equipment and by way of interest on its mortgaged indebtedness.

From and after the time when the first item of these excessive charges was collected, to-wit-August 29, 1906. down to the date of the appointment of the receivers on May 27, 1913, there was at all times in the treasury of the defendant railroad company an amount of money in excess of the aggregate of the claims of the interveners with interest. On May 27th, when the receivers of defendant railroad company were appointed, the defendant railroad company had on hand and turned over to the receivers over \$600,000,00 in cash. Some days after the appointment of the receivers, certain banks appropriated enough of this fund to reduce it to \$338,000.00. These excessive charges were not kept by the defendant railroad company in a separate fund but were mingled with the general re-[fol. 151] ceipts of the railroad company. The depositories of the railroad company had no instructions to keep the excessive charges collected by the railroad company in a specific fund, and did not keep the moneys representing said excessive charges in a separate account. road company, during all of said time, was constantly diminishing its funds by checking thereon and just as constantly increasing them by deposits, but it always had on hand in its treasury, as above stated, an amount in excess of the aggregate of the claims of the interveners with interest

Subsequent to the receivership the claim of the Corporation Commission of the State of Oklahoma, for overcharges exacted from shippers in Oklahoma, amounting to \$76,627.35, was allowed as a preferred claim and paid. A claim for \$12,124.51, in favor of a surety company, was allowed on account of similar overcharges as a preferred claim and paid. There were no other depletions of the fund turned over by the railroad Company to the receivers. After the appointment of the receivers, the receivers paid out large sums of money for supplies, etc. purchased prior to the receivership. On the other hand, the railroad company turned over to the receivers, and the receivers received, supplies, etc. of equal or greater value.

After the receivers were appointed, they paid out large sums of money to other railroad companies in settlement of car service and traffic balances. Settlements between railroads, however, on this kind of business were made on

the basis of net balances and while for the first few days of the receivership the disbursements on account of this class of claims exceeded the receipts, yet the receipts on account of this class of business accruing prior to the receivership largely exceeded the disbursements on account of this class of business. According to the first bi-monthly report of the receivers, the receipts on account of this class of business accruing prior to the receivership were \$395, 374.71 and the disbursements \$396,286.58. According to the second bi-monthly report of the receivers, the receipts were \$229,953.84 and the disbursements \$191,198.71. From December 31, 1908, to May 15, 1913, the defendant railroad company issued \$55,257,220.00 of its general lien fifteentwenty year gold bonds and between 1910 and 1912 it issued \$2,444,000.00 of its secured gold notes and between June 21, 1909 and November 21, 1911, the Kansas City, Fort Scott & Memphis issued \$3,421,950.00 of its refunding mortgage four per cent bonds. There is no showing for what purpose these bonds were issued or to what use the proceeds were put. During all of said years when these bonds [fol. 152] were being issued, the net operating income, that is to say—the excess of operating income over operating expenses, including taxes—was in excess of \$11,000,000.00 each year.

As stated above, all of the properties of the defendant railroad company which passed to the receiver, except some non-productive properties which were left out of the plan of reorganization, were turned over to the reorganized company, the St. Louis-San Francisco Railway Company on November 1, 1916. At this time the receivers turned over to the new company over \$5,000,600.00 in cash which they had accumulated during the receivership.

In May, 1914, an interlocutory decree was entered in the receivership case, wherein among other things, the Court ordered that the holders of claims against the defendant railroad company should file their claims with the Special Master by October 1, 1914, and failing so to do, their claims should be barred. This time for filing claims was subsequently from time to time extended, finally expiring February 1, 1916. Notice by publication of the foregoing provision of the interlocutory decree was given as required by the decree. In March, 1916, a final decree was entered

in the receivership case. It is not necessary to set out the pertinent provision of the final decree in these findings of fact as they will be referred to in the conclusions of law. Accordingly the Master finds all of the issues raised by the pleadings in favor of interveners.

## Conclusions of Law

Both the defendant railroad company and the railway company have in their answers offered certain pleas in bar. Of necessity, these should be disposed of first.

First. It is contended that since interveners did not file their claims within the time prescribed by the interlocutory decree, they are barred and the intervening petitions should be dismissed.

Second. It is contended that these claims arose prior to the entry of the final decree and that therefore they are barred by the final decree, and that the intervening petitions should be dismissed.

Third. It is contended that because interveners filed suits in the Federal Court at St. Louis, similar to the suits filed in the District Court of the United States for the Western [fol. 153] Division of the Western District of Missouri, and after the defendant and the other carriers involved in those suits had submitted themselves to the Jurisdiction of the District Court for the Western Division of the Western District of Missouri, permitted the suits in the Federal Court at St. Louis to be dismissed for want of prosecution their claims are barred and the intervening petition should be dismissed.

His Honor, Judge Sanborn, on the applications of the interveners for leave to intervene, ruled on these pleas adversely to the defendant and the railway company. Judge Sanborn's memorandum opinion in that regard is as follows:

"In view of the opinion in Love vs. North American Company, 229 Fed. 123, and of the averments of the applicants that on account of the necessity of first establishing their claims by the findings and orders of the Interstate Commerce Commission, they could not have enforced them in

the foreclosure procedings at any time, before February 1, 1916, the limit of time fixed for presenting claims by the orders in those proceedings, and that they have been diligently establishing these claims by necessary litigation before the Interstate Commerce Commission, the District Court and the Supreme Court, and that they notified the attorneys for the purchasers at the foreclosure sale before they paid for their purchase of their claims and of their intention to press them, the court is not persuaded that they are barred in this Court of Equity from a presentation and consideration of their claims either by the orders limiting the time within which claims were to be presented in the foreclosure proceedings or by the inexcusable laches of the applicants."

The order of reference made on those applications for leave is as follows:

"Upon consideration of the application of E. B. Spiller for leave to file intervening petition herein, which was verified December 2, 1920, and of the argument of the counsel for the respective parties upon the hearing of this application, it is hereby

Ordered that the application be granted; that the applicant have leave to file his petition; that the St. Louis and San Francisco Railway Company answer the petition or take such other action against it as it may be advised within [fol. 154] twenty days after the service of this order by its attorneys, and that the issues raised by the intervention be and they are hereby referred to the Special Master for hearing, consideration, report of the facts and his conclusions."

It appears from the files in this case, and from the statement of counsel to the Master that these very pleas in bar, which are now urged, were presented to Judge Sanborn and considered by him, both on the original application and on the subsequent application to file the supplemental intervening petition.

I would infer, therefore, that Judge Sanborn's opinion is a direction to me to consider these cases on their merits, but in order to avoid the possibility of a re-reference, I have considered it my duty to hear all the evidence offered by either side on these pleas in bar, and to consider the matter de novo. After a thorough investigation of this subject, I am convinced that the pleas in bar are without merit for the following reasons:

A court of equity has discretionary power to permit the filing of claims in a receivership case after the order fixing the time within which claims must be filed and after the entry of the final decree.

People ex rel vs. Security Life Ins. & Annuity Co., 70 N. Y., l. c, 271.

Washington Bank vs. Creditor, 80 N. Car., l. c. 10, Park vs. N. Y. etc. Ry. Co., 140 Fed. 799, In re Ziegler, 90 N. Y. Sup. 683, Grinnell vs. Insurance Co., 16 N. J., 283,

Wall vs. Young, 54 N. J. Eq., 24.

Equity requires the favorable exercise of this discretionary power in cases where the claimant can not be charged with inexcusable laches, and where all of the assets of the estate have not been distributed to the creditors. In the case of People ex rel. vs. Security Life Ins. & Annuity Co., supra, the Court said:

"The power of the court over the proceeding is the same as it would be over a final decree obtained in a creditor's suit commenced for the benefit of all parties. In such a case it is well settled that a creditor, upon a proper case made by petition, may be permitted to come in and prove his debt at any time while the fund or any part thereof is under the control of the court, notwithstanding the time [fol. 155] limited by the master for the creditors to come in and prove their debts had expired, or, as is elsewhere said, 'The neglect or omission of one will not preclude his right to be afterwards let in, provided the other creditors are placed in no worse condition than if all had come in at the same time.'

It can not reasonably be said that the interveners in this case were guilty of laches. On the contrary, it seems to the Master that they were persistently diligent. Their representative, The Cattle Raisers' Association of Texas, in 1904,

attacked the rates which had been put into effect by the defendant railroad company in 1903 as unjust and unreasonable in the only tribunal where such a complaint would lie. After an extensive hearing, the Interstate Commerce Commission found that the rates charged were unreasonable and unjust to the extent of three cents a hundred pounds, and found that the carriers should be required to desist from charging that excessive and unlawful rate. Thereupon a petition was filed by The Cattle Raisers' Association for more specific findings of fact. The Hepburn Bill went into effect in 1906, whereupon The Cattle Raisers' Association filed a petition with the Interstate Commerce Commission asking that the Commission proceed with the original case to the making of an order under the fifteenth section of the Act to Regulate Commerce as amended. Another extensive hearing was had before the Commission and in November, 1908, the Commission reaffirmed its order of 1905, declaring the rate to be unjust and unlawful to the extent of three cents a hundred pounds, and made an order fixing the rates for the future. The defendant railroad company, and the other carriers involved, thereupon filed a suit in this Court to enjoin the Commission from carrying that rate into effect. The injunction was denied by the Circuit Court and an appeal was taken by the defendant and other carriers to the Court of Appeals, where the judgment of the lower court was affirmed in 1911. Thereupon, the interveners proceeded with their claims for reparation before the Interstate Commerce Commission.

In January, 1914, the Interstate Commerce Commission decided these claims and made the orders of reparation, ordering the defendant to repay to the interveners the moneys which formed the basis of these interventions. Under the law, and under the order of the Interstate Commerce Commission, the defendant had six months within which to comply with that order. During that time the interveners could do nothing. In December, 1914, interveners, [fol. 156] in conformity with the procedure laid down in the Act to Regulate Commerce brought their suits in the District Court of the United States for the Western District of Missouri. With no unnecessary delay, those suits were brought to judgment in August, 1916, in that court.

Thereupon, the defendant, together with the other carriers. appealed from that judgment to the Circuit Court of Anpeals of this Circuit. In March, 1918, the Circuit Court of Appeals reversed and remanded those cases, upon, and with proper diligence, the interveners appealed by writ of certiorari to the Supreme Court of the United The Supreme Court of the United States, in the latter part of May, 1920, reversed the judgment of the Cir. cuit Court of Appeals and affirmed the judgment of the District Court for the Western Division of the Western District of Missouri. Thereupon, interveners filed a petition in the latter court for the allowance of additional attorneys fees. to be taxed, as costs. In July of 1920, that Court rendered judgment sustaining the application for the allowance of additional attorneys' fees. In December of the same year, interveners filed their petitions for leave to intervene.

Every step that intervenors took to recover the excessive charges exacted from them and their assignors was vigorously opposed in turn by the defendant railroad company, by the receivers and by the railway company, through their attorneys. That there was no laches appears to be the only reasonable inference that can be drawn from the conduct of the parties. This is especially true in view of the fact that neither the intervenors nor their counsel had notice or knowledge of the making of the interlocutory decree or of the final decree until long after the time therein fixed for

the filing of claims had expired.

In the case of Northern Pacific Railway Company v. Boyd, 228 U. S. l. c. 509, this question of laches was raised. There the delay was much greater than it is in this case. The Supreme Court said (page 509):

"His delay was not the result of inexcusable neglect, but in spite of diligent effort to put himself in the position of a judgment creditor of the Cœur D'Alene so as to be able to proceed in equity to collect his debt. He accomplished this result only after protracted litigation, beginning in 1887 and continuing through the present appeal (1913)."

It is urged by the defendant and the railway company that other claimants of reparation filed their claims in the [fol. 157] receivership case even before the Interstate Com-

merce Commission had made orders of reparation, and that those claims were allowed for such amounts as the Interstate Commerce Commission might fix by its orders of reparation. The Master does not believe that this fact is ma-The intervenors followed the procedure prescribed by the Act to Regulate Commerce. If, then, we are are to determine what the attitude of the defendant and the receivers might have been had intervenors filed their claims without resorting to the remedy prescribed by the Act to Regulate Commerce, by what they did in opposition to the efforts of the intervenors to establish their claims in conformity with the procedure laid down by the Act, the Master must assume that an effort would have been made to have the claims thrown out on the theory that the procedure prescribed by the Act to Regulate Commerce was exclusive: but, be that as it may, as said above, the Master does not believe that it is material what others did, or what agreements might have been entered into by other claimants and the attorneys for the receivers.

That no other creditor will be injured by the consideration and allowance of these claims is plain. What the general creditors of the defendant received under the reorganization can neither be cut down nor increased by the consideration and allowance of these interventions. The general creditors received an offer of settlement of their claims under the reorganization which the Court found reasenable. No offer of settlement of any kind was ever made to these intervenors. It, therefore, is clear that as to these intervenors under the authority of the case of Northern Pacific Railway v. Boyd, supra, there has never been any distribu-

tion of the assets of this estate.

As the Master interprets the final decree, it, in his opinion, contemplated that claims such as these might be filed after its entry. Article 9 of the decree provides that the purchasers of the property shall take the property and receive the deeds or other instruments of conveyance upon the express condition that they will satisfy and discharge.

"(b) Any unpaid claims of creditors of the defendant railroad company which have been or shall be admitted by the parties in interest, or adjudged by this Court to be prior in lien or superior in equity to the refunding mortgage or to the general lien mortgage."

By paragraph (b) of Article 10 of the final decree, the receivers were required to file a statement showing all un-[fol. 158] paid liabilities incurred by the railroad company prior to the appointment of the receivers, which so far as they were informed, were claimed to be prior in lien and superior in equity to the refunding mortgage. By paragraph (e) of this same article, all claims which had been filed pursuant to orders theretofore made were required to be listed. It will thus be seen that two classes of claims were required to be listed-first, those for which priority was claimed, and second, those which had been theretofore filed. It is then provided in this article of the decree that all claims which had not been filed in accordance with the orders theretofore made should not be [enforcible], except, or as to the decree itself reads, "other than any claim or demand which may arise after the entry of this decree." The Master is of the opinion that the word "arise" in this decree is not used in the sense of "accrue." It would be difficult, if not impossible, to conceive of a claim accruing against the railroad company after the entry of the final decree. The railroad company stopped functioning when the receivers were appointed. A claim, however, might arise for the consideration of the Court after the entry of the final decree, and the Master is of the opinion that these interventions are claims arising after the entry of the decree.

The receivers, though they had been constantly litigating these claims and had been informed that priority was claimed for them, did not list them as required by para-

graph (b), Article 10 of the final decree.

It is urged by the railroad company and the railway company that no appeal was taken by the intervenors from the final decree. In the Master's opinion that does not affect the situation. Moreover, the intervenors had no notice or knowledge of the making of either the interlocutory decree or the final decree. They were not at that time parties to the cause either personally or by representation. Northern Pacific Railway v. Boyd, 228 Fed. l. c. 502, 505.

It is urged also that the railway company purchased the property under the final decree, and that it became a part of the contract of purchase and that to allow the claims of intervenors would disturb its contract rights. Under the

Master's interpretation of the final decree, the railway company took this property subject to the claims of intervenors if they are allowed. That is a part of their express undertaking. It would seem moreover, that even if this were not true, the sale to the railway company while valid as between creditors to whom offers of settlement had been [fol. 159] made, and the stockholders of the old company and the purchaser, yet as between these intervenors and the purchaser, the sale was a mere form and void. The equity of the stockholders of the old company in the properties transferred to the new company was recognized in the reorganization, and for their equity, the stockholders in the old company, both preferred and common, received stock in the new company. No offers of settlement, either of cash or securities, were ever made to the intervenors. Their claims were vigorously and consistently opposed by the railroad company, by the receivers and finally by the railway company itself. The receivers, the reorganization managers, the railway company all knew of these claims, and knew that it was claimed that the claims were prior in right and superior in equity to the claims of all other creditors, includ-Before the sale was confirmed, they ing bondholders. were so notified in open court and by actual written notice.

The Master is unable to see under these circumstances why the same rule that applied in the direct suit of Northern Pacific Railway v. Boyd does not apply in this case. However, under the views heretofore expressed, it is not necessary to rule on the question as to whether or not the sale was valid or invalid. The Master is of the opinion, in line with the opinion of His Honor, Judge Sanborn, that intervenors are not barred in this court of equity from a presentation and consideration of their claims on their merits either by the orders limiting the time within which claims were to be presented in the foreclosure proceedings, or by inexcusable laches of the applicants.

Intervenors contend that their claims embraced in their original bills of intervention should be allowed and given priority over the claims of all other creditors, including bondholders, and base their contention on three grounds.

First. On the ground that the excess charges were unlawful exactions taken from them, or their assignors, by

duress, and that therefore the defendant railroad company became a trustee ex maleficio for their benefit;

Second. On the ground that these excess charges were taken from the intervenors and their assignors, the shippers, against their will, and that, therefore, these claims come within the rule which underlies the right to a preferential payment. In other words, it is contended that in principle, these claims come within the rule under which claims for labor, supplies and like things necessary for the ordinary operation of the railroad are held to be preferential.

[fol. 160] Third. That a sound public policy requires that they be allowed as preferential claims.

It would serve no useful purpose to analyze all of the decisions cited by counsel on the question as to when a trustee ex maleficio arises. It is well settled that where one wrongfully obtains the possession of another's property by fraud, duress, or by taking advantags of that other's weakness, the persons thus obtaining the property holds it in trust for the other as a trustee ex maleficio. In 3 Pom. Equity Jur., Section 1053, the rule is thus stated:

"In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of one who is truly and equitably entitled to the same."

That a railroad company and a shipper are not on an equal footing is too plain for argument. That a shipper who pays to a railroad company a rate in excess of a reasonable rate is, as to such excess, acting under practical duress is equally plain. The collection by a railroad company of an unjust and unreasonable freight rate is, as to the excess over a reasonable rate, wrongful and unlawful. A railroad company, therefore, which collects from the

shipper an unreasonable rate is, as to the excess over a reasonable rate, a trustee ex maleficio for the shipper,

Love vs. North American Company, 229 Fed. l. c. 106.

White vs. Delano, 270 Mo. 216.

Mercantile Trust Co. vs. St. Louis & San Francisco R. R. Co., 69 Fed. 193.

Angle vs. Chicago, St. P., M. & O. R. Co., 151 U. S. 125.

Chapman vs. Douglas, 107 U.S. 348.

Central Stock & Grain Co. vs. Bedinger, 109 Fed. 926, Richardson vs. New Orleans, 102 Fed. l. c. 782.

In the case of Love vs. North American Company, supra, which was a case that arose in this Frisco receivership, and in which the facts are practically identical with the facts in this case, the Court said:

"The question now might be properly asked, to whom do the excessive charges received by the Frisco Company for [fol. 161] the transportation of freight belong? They certainly do not belong to the general creditors of the Frisco Company, nor to the bondholders, nor the Frisco Company itself. Without question they belong to the shippers. We must not be deceived as to the true status of this claim, nor allow the bond, or the fact that the claim is presented by the Corporation Commission, to bind us to the fact that the claim is one due to the shippers for excessive charges paid by them to the Frisco Company for transportation of freight. The shippers not only paid the lawful charge, but they did more. They paid an excessive charge. That payment was an illegal exaction, and, as against the railroad company, and volunteeers, like the receivers, the money belonged to the shippers after the payment the same as before. It will be presumed that it was a part of the money in the treasury of the company which passed to the receivers. That money came into the hands of a court of equity. What ought such a court to have done with it? Surely it could do nothing but direct that it be returned to the shippers to whom it belonged. It having been paid to the bondholders, or for permanent betterment of the property for their benefit through the agency of a court of equity, that court, as a court of conscience, can do no less than direct its restoration.

That the defendant railroad company exacted from these intervenors and their assignors an unreasonable and unjust freight rate, to the extent of three cents per hundred pounds, must be conceded. That this exaction was obtained by duress is settled. The railroad company always had on hand in its treasury, from the time the first unreasonable and unjust charge was exacted down to the date of the anpointment of the receivers, an amount of money in excess of the claims of intervenors with interest. Regardless of what may be said of the action of the banks in appropriating part of the moneys turned over by the defendant railroad company to the receivers on their appointment, it remains that the defendant turned over to the receivers and the receivers received at least \$338,000.00. presumed that the money which was legally exacted from the intervenors and their assignors was a part of the money in the treasury of the company which passed to the receivers. A court of equity, "a court of conscience, can do no less than direct its restoration."-Love vs. North American Company, supra.

It is contended by the defendant and the railway company that since the rates collected were the published rates, [fol. 162] they were not unlawfully collected. The Master is unable to agree with this contention. By Section 1 of the

Act to Regulate Commerce, it is provided:

"All charges made for any service rendered, or to be rendered in the transportation of passengers or property, as aforesaid, or in connection therewith or for the receiving, delivering and handling of such property, shall be reasonagle and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

This section is but declaratory of the common law.

On August 16, 1905, the Interstate Commerce Commission after a full hearing, found that these rates were unjust and unreasonable, its order in that regard being as follows:

"It has been found that the advances made during the year 1903, as shown by the appendix, were unjust and unreasonable, and that the present rates are unjust and unreasonable by the amount of said advances. The defendant

should, therefore, be required to cease and desist from the maintenance of these rates. \* \* \* All questions of reparation are reserved."

All of these exactions, therefore, were obtained in the teeth of the prohibition of Section One of the Act and of the findings of the Interstate Commerce Commission.

Section Six of the Act to Regulate Commerce requires all railroads to publish their rates. As long as a rate is the published rate, a carrier cannot charge or demand or collect or receive a greater or less rate than the published rate. In other words, the published rate is the rate which the carrier must charge and the shipper must pay. A violaion of the Act in this respect is declared to be a misdemeanor. It is conceded that the rate charged these intervenors, and their assignors, was the published rate. The question is therefore, Can a railroad company by continuing to publish an unreasonable and, therefore, unlawful rate, make the rate a lawful rate? To give this effect to Section Six of the Act would mean that Section One must be utterly destroyed and construed out of the Act. In the opinion of the Master no such effect can be given to Section Six.

In enacting the Act to Regulate Commerce, Congress had at least two principal objects in view-the prohibition of unreasonable and unjust rates and the preventing of discrimination of all kinds. These two objects are accom-[fol. 163] plished in Sections One and Six of the Act, and effect may be given to both of them. This same question has been before the Interstate Commerce Commission many times. In those cases it was urged by the carriers that since the published rate was the legal rate, therefore, in charging it, the carrier was doing something it had a full right to do, and therefore, in collecting that published rate, they were not injuring the shipper, and therefore, since the shipper had suffered no wrong, he could not be entitled to reparation. Passing on this question, the Interstate Commerce Commission, in Arkansas Fuel Co. vs. C. M. & St. P. Ry. Co., 16 I. C. C. Reports, page 97, said:

"It has been said that the word 'legal' looks more to the letter and 'lawful' to the spirit of the law; that 'legal' imports rather that the forms of law are observed and the

rules prescribed obeyed and the word 'lawful' that the act is rightful in substance. The two words may aptly be used as illustrative of the distinction that we have attempted to draw in the cases cited. It is provided in section 6 of the act that no carrier shall collect or receive a greater or less compensation than the rates specified in the tariff in effect at the time of the movement. Other provisions of law make it a misdemeanor for the carrier to depart from the published rate. In dealing with shippers the carrier is therefore required to conform the freight charges actually collected to the amount fixed in its published tariffs. sense the published rate in effect at the time of the movement is therefore the legal rate. It is what the letter of the law requires the shipper to pay and the carrier to collect.

"But the first section of the act, following the rule of the common law, declares that all charges for services rendered by a carrier in the transportation of passengers or property shall be reasonable and just. It also declares every unjust and unreasonable charge for such a service to be unlawful. In publishing a rate or schedule of rates the carrier therefore acts under this admonition of the statute. While it may be, and indeed is, the legal rate—the rate that must be paid by the shipper and collected by the carrier because it is the published rate—the mere publication cannot make a rate lawful that is unreasonable and excessive."

The question has been decided in principle by the Supreme Court of the United States, and by the Circuit

Courts of Appeal on several different occasions.

The case of Southern Pacific Company vs. Darnell-Taenzer Co., 245 U. S. 531, was a reparation case. In that case [fol. 164] the excessive freight charge had been passed on by the shipper to the consumer, and it was contended by the railroad company that the shipper had suffered no loss. Mr. Justice Holmes said (on page 534):

"The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum."

If the exactions had not been unlawful, the claim could not have accrued at the time the exactions were made. The carrier receives the illegal profit when the exaction is made. In this same case, the Court said:

"But here the plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of the proximate loss."

In the case of Mills vs. Lehigh Valley R. R. Co., 238 U. S. 473, which was a reparation case, the Interstate Commerce Commission had found that the shipper was entitled to the excess charges as reparation. It was contended by the railroad company in that case that this was not a finding that the shipper had been damaged.

Mr. Justice Hughes, on page 481, said:

"What the Commission decided was that the shippers were entitled to reparation, that is, to be made whole, to be compensated for a loss because of an illegal and unreasonable exaction \* \* \* ","

In the case of Phillips vs. Grand Trunk Ry. Co., 236 U. S. 662, a case in which recovery was denied because suit had not been filed within the time fixed by the statute, the Court, through Mr. Justice Lamar, said:

"But while every person who had paid the rate could take advantage of the finding that the advance was unreasonable, he was obliged to assert his claim within the time fixed by law. When the overcharge was collected a cause of action at once arose and the shipper at once had the right to file a complaint or to intervene in proceedings instituted by others."

The cause of action at once arose because the exaction was unlawful at the time it was made.

[fol. 165] The Circuit Court of Appeals, in the case of Darnell-Taenzer Co. vs. Southern Pac. Co., 221 Fed. l. c. 894, said:

"Cases of excessive and unreasonable rates differ from discriminating charges in the fact that in the latter there is nothing unlawful in the charging and receiving of the higher or published rate on which the demand for reparation is based; the unlawfulness is in giving a lower rate to someone else. On the other hand, the charging of an excessive and unreasonable rate is ipso facto unlawful."

In the case of Texas and Pacific Ry. vs. Abilene Cotton Oil Co., 204 U. S. 426, Chief Justice, then Justice White, said:

"Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaint of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force."

A wrong cannot be unlawfully suffered if the act which causes the wrong is a lawful act. All of these cases hold that the exaction of an unjust and unreasonable rate is an unlawful exaction, and unlawful at the time it is made. It can make no difference that in the interest of uniformity, a shipper, before he can bring his action to recover, must secure a finding of the extent to which the rate is unreasonable and unjust. The basic act itself is unlawful. The prescribed procedural steps can not affect the situation.

At the very outside, no greater effect can be given to Section Six of the Act than to pass the bare legal title to the unlawful exactions to the carrier, leaving in the shipper the beneficial ownership of the money unlawfully exacted from him. In such a case, the carrier becomes a trustee ex maleficio for the shipper.

Angle vs. St. P. M. & O. R. R., 151 U. S. 125.

The Master rules this point against the defendant and the railway company. This conclusion is reached without regard to the fact that the Interstate Commerce Commis-

sion, before these excessive charges were collected, had declared them to be unreasonable and unjust. That fact is. of course, an added reason for the conclusion.

[fol. 166] It is next urged that because of the provisions of Section 16 of the Act to Regulate Commerce, the status of interveners is that of general unsecured creditors, with no right to priority over anyone. Under this section of the Act, if the Interstate Commerce Commission shall determine that a shipper is entitled to an award of damages, it shall make an order directing the carrier to pay the sum to which the shipper is entitled on or before a day named. If the carrier does not comply with this order for the payment of money, then the shipper may file in the district court of proper jurisdiction, or in any state court of general jurisdiction, having jurisdiction of the parties, a petition setting forth the causes for which he claims damages and the order of the Commission in the premises. Such suit shall then proceed in all respects like other civil suits for damages except that the order of the Commission is made

prima facie evidence of the facts therein stated.

Does this section of the Act make the shipper, as to unlawful exactions of freight charges, a general creditor of the earrier against the shipper's will? The Master believes that no such result was intended, and that no such result follows. This section does prescribe a remedy at law which the shipper must pursue. But it does not take away from him his equitable remedy to thereafter impress a trust, if the latter remedy is necessary in order that he may get back that which was unlawfully taken from him. Too much significance must not be attached to the word "damages." If a citizen is robbed of his money, he is damaged. If his property is taken away from him by fraud, he is damaged. If it is taken away from him by duress, he is damaged, and in all three cases he can sue the wrongdoer in tort for damages. He may also sue to impress a trust. The status of the interveners can not be determined by stressing mere procedural terms. We must consider the substance, and not the mere form. We must look back to the facts which lie at the root of the transaction. It is the basic facts that must determine the rights of the interveners and their remedies. We must not blind ourselves to the fact that the claims of the interveners are claims

due to the shippers for excessive charges paid by them to the railroad company for the transportation of freight.

As a part of this same contention, it is urged by learned counsel for defendant and the railway company that all the remedies of the shipper, except the remedy prescribed in Section 16 of the Act, are abrogated by the Act. Section 22 of the Act provides:

[fol. 167] "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

It is true that this section and Section 9 of the Act have been limited in their scope by the Supreme Court of the United States. The case of Texas & Pacific Ry, Co, vs. Abilene Cotton Oil Company, 204 U. S. 426, is, so far as the Master has found, the leading case on the interpretation of these sections. In that case the plaintiff brought suit to recover unreasonable freight charges without having secured any finding from the Interstate Commerce Commission as to the extent to which the rate was unreasonable and As has been heretofore stated, the purpose of the Act to Regulate Commerce was to secure uniformity of rates and to prevent discriminations of all kinds, as well as to prohibit the charging of unjust and unreasonable The Supreme Court held that if shippers could invoke the aid of the courts without first going to the Interstate Commerce Commission, then one of the objects of the Act-to-wit, the securing of uniformity-would be destroyed. One shipper might go into one Court and secure a judgment. Another shipper, similarly situated, might go into another court and fail. Two shippers might appeal to the same court and get different results, depending upon the evidence presented. Rebates could be secured by fictitious suit, and all of the evils of this character which the Act sought to prevent would be revived.

"A shipper cannot maintain an action against a common carrier to obtain relief from an alleged unreasonable freight rate exacted from him for an interstate shipment, without reference to any previous action by the Interstate Commerce Commission, where such rate has been filed with that Commission and promulgated as provided by the Act to regulate commerce, and is the rate which it is the duty of the carrier, under that act, to enforce against shippers until changed in accordance with the provisions of that statute, since the independent right of an individual originally to maintain actions to obtain precuniary redress for violation of the act conferred by section 9 be confined to such wrongs as can consistently with the context of the act be redressed without previous action by the Commission; and the provision of section 22 that nothing therein 'shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies' cannot be construed as continuing in shippers a common law right [fol. 168] the continued existence of which would be absolutely inconsistent with the provisions of the statute. In other words, the Act cannot be held to destroy itself."

It is, therefore, clear that those common law remedies, the continued existence of which in the shipper would be absolutely inconsistent with the Act, are abrogated. However, it is equally clear that those common law remedies, the continued existence of which would not be inconsistent with the Act, are reserved to the shipper. In considering this proposition it must be borne in mind that repeals by implication are not favored. This rule is clearly stated by the Supreme Court in this Abilene Cotton Oil Co. case:

"In testing the correctness of this proposition, we concede that we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperately required; that is to say, unless it be found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

Of course, there is nothing in the remedy these interveners are now pursuing which is inconsistent with the Act to Regulate Commerce, or which is repugnant to the

Act to Regulate Commerce. On the contrary, the existence of this remedy in this case would seem to be necessary in order to bring about and insure the uniformity which the Act to Regulate Commerce was designed to secure. The carriers who remained solvent repaid to the shippers the illegal exactions. This remedy puts the carrier in this case on the same footing with the other carriers. The Master rules these contentions against the defendant and the railway company.

The learned counsel for the interveners argued at length in their brief, that there was nothing in the Act to regulate Commerce, depriving interveners of the remedy pursued in this case. This contention, the Master believes to be en-

tirely sound.

Interveners' counsel also discussed at length the proposition, whether there was anything else depriving their clients of the remedy now employed. After pointing out the basic theory of the trust fund doctrine, namely, the right [fol. 169] to recover money wrongfully and unlawfully, and by duress collected, 39 Cyc. 591, Oelrichs v. Williams and Oelrichs v. Spain, 15 Wall. 221, 21 L. ed. l. c. 44, they invoke the fundamental legal maxim, "Ubi jus, ibi remedium," and the corresponding equitable maxim, "Equity will not suffer a wrong without a remedy."

They cite Broom on Legal Maxims (8th Ed. p. 191, et. seq.), citing the celebrated case of Ashby v. White, 2d Ld. Raym. 953, and also the famous opinion of Chief Justice Marshall in the case of Marbury v. Madison, 1 Cr. 137, 2d

L. ed. p. 60.

In Pomeroy's Equitable Jurisprudence, Vol. 1, Sec. 423, this great authority on equity jurisprudence discusses the above corresponding equity maxim, and points out the universality of its application.

Its application has been so often exemplified that it would be useless to attempt to give more than a few controlling

authorities.

Toledo, A. A. & N. M. Ry. Co. v. Penn. Co. et al. 54

Fed. 746, l. c. 751, 752.

Southern California Ry. Co. v. Rutherford, et al. (Circuit Court, Southern District of California, June 30, 1894) 62 Fed. l. c. 797, 798.

The Federal and State Courts have often invoked and applied this maxim of equity, and the other maxims, namely, "equity delights to do justice and that not by halves," or as more commonly expressed, "equity will do complete justice." Again, "equity regards that as done, which ought to be done;" and, "equity regards substance, rather than form;" and, "equity imputes an intention to fulfill an obligation." In equity there is no wrong without a remedy.

Harrigan v. Gilchrist, 99 N. W. 909.

Mercantile Trust Co. v. St. Louis & San Francisco Ry. Co. Ogden, et al., interveners, 69 Fed. 193.

Sweet v. The Montpelier Savings Bank & Trust Co. 69 Kan, 641 (77 Pac. 538).

Matthews v. Forslund, 112 Mich. 591.

Barksdale, et al., v. Finney, et al. 14 Grattan, 338.

Williams v. Young, 81 Atlantic, 1118.

Trader's Bank v. Fraser, 162 Mich 315, l. c. 318.

Converse v. Sickles, 44 N. Y. Supp. 1080, affirmed in 161 N. Y. 666.

[fol. 170] Sugar Refining Company v. Fancher, 145 N. Y. 552, l. c. 561.

The cases just cited also announce the proposition that a judgment at law is in many cases not such an election of the remedy as will preclude a bill in equity to impress a trust, because there is no inconsistency whatever between the two proceedings.

In pursuing the remedy pointed out by 'ection 16 of the Interstate Commerce Act, interveners manifestly made no election, because that was the only remedy available, and because that remedy had to be pursued to its final conclusion before any other remedy became available.

Southern Pac. Co. v. Goldfield Co. 200 Fed. Rep. 14, L. C. 18.

Since there was no freedom of choice, the doctrine of election of remedies cannot apply in this case.

20 C. J. P. 21.

These propositions, just stated, have not been denied or controverted in any manner by the learned counsel for the defense, and in the Master's opinion they strongly fortify the conclusion above announced.

The second contentic, of the interveners that their claim should be allowed under the rule which underlies the right to preferential payment of claims for labor, supplies, etc. must be sutained. The operating income of defendant railroad company from June, 1906 to May 27th, was over \$92,000,000.00. During the receivership, the operating revenue largely exceeded the operating expense, including taxes. The receivers turned over to the railway company over \$5,000,000.00 after paying out large sums of money from operating income as interest on bonded indebtedness and for betterments to the road and to equipment, and for the purchase of new equipment.

Equity regards the substance and not the form. These claims represent money illegally exacted from the shippers. They are not, and never have been, voluntary creditors of the defendant railroad. The test of the preferential equity of a claim of this kind is its consideration. The consideration for these claims is the money which the railroad company wrongfully and unlawfully obtained from the shippers. Money, even more than supplies, labor, etc. is necessary for the ordinary operation of a railroad in the usual course of its business. Freight rates are the lifeblood of railroad operations. Without them no railroad could own a [fol. 171] wheel, much less turn one. Under both reason and authority, these claims are preferential under this rule. As was said by the Circuit Court of Appeals in the case of Love v. North American Company, in which claims facts identical with the facts in this case were involved.

"Petitioner's claim also comes within the rule which underlies the right to a preferential payment. Freight rates are the lifeblood of railroad operation. It will not be contradicted that, if there were no freight rates paid in the United States, not a wheel would turn on any road. What does the law say in regard to the allowance of preferences? We accept the law as established by the Supreme Court of the United States, and by this court, as follows:

"The class of claims which under the decisions of the Supreme Court may lawfully receive an equitable preference in payment out of the income or out of the corpus of the property of a mortgaged railroad over the bondholders secured by a prior mortgage is limited to claims incurred for the current copenses of the ordinary operation of the mortgaged property in the usual course of the business of the mortgagor. The test of the preferential equity of a claim is its consideration. If its consideration was a current expense of the ordinary operation of the property of the mortgagor incurred in the usual course of its business, for labor, supplies, and like things, necessary for the operation of the railroad, within a limited time, usually not exceeding six months anterior to the appointment of the receiver, the claim may be preferred in payment, otherwise it may not be. \* \*

"We think that what has been heretofore said establishes that the claim of the shippers is a claim incurred 'for the current expenses of the ordinary operation of the railroad in the usual course of business of the road.' On principle it cannot be distinguished from payments to sureties who have signed bonds to stay the execution of judgments and claims for holders of unused tickets for refunds, and many other like charges which are habitually allowed, and have been allowed in the receivership of the Frisco Company."

It is urged by learned counsel for the defendant and the railway company that the bondholders received no benefit from these illegal exactions. It seems to the Master that it might as fairly be said that the bondholders received no benefit from the legal freight rates collected by this comfol. 172] pany. While it must be presumed under the facts shown that the shippers' money always remained in the treasury of the company, yet the shippers' money operated to swell the funds in the treasury of the defendant, and thus made it possible, or at least aided in making it possible, for the bondholders to receive the interest on their bonds.

It is again urged that the preferential allowance of these Surely, it can not be reasonably claimed that the bondholders contracted for the security of unreasonable, unjust and unlawful freight charges. When they took their bonds, they took them with the law written into them which forbade the charging of an unreasonable and unjust freight rate. It follows that the bondholders acquired no interest of any kind in these excessive charges. Therefore, the preferential allowance of these claims takes from the bondholders nothing to which they are entitled.

It is further urged by the defendant railroad and the railway company that under the authority of the case of Chicago & Alton Railroad Company v. U. S. & Mex. Trust Co., 225 Fed. 940, these claims can not be given preferential allowance. In the opinion of the Master, that case, except to the extent that it announces the rule underlying the preferential equity of claims of this kind, has no application to this case. In all respects where that case is applicable to this case, it is in harmony with the Love case. In that case, Chicago & Alton Railroad Company was attempting to have allowed as a preferred claim car repair balances and money paid for the Orient Railroad for fuel, and for the Orient's proportionate share of overcharge and loss and damage claims on interline shipments of freight received by the Chicago & Alton from the Orient. In that case there was no surplus income and no diversion of income. The Chicago & Alton was not a shipper from whom the Orient had unlawfully exacted freight rates. It was a carrier and had a balance due it under some interline agreement. It had paid to others some overcharges of some kind, part of which were chargeable to the Orient. Under the authority of the Love case, the claims involved in the Chicago & Alton would not be entitled to preferential allowance.

It is contended by the defense that interveners' claims are not preferentially allowable under this rule in any event because they accrued more than six months prior to the appointment of the receivers. The Master can not agree [fol. 173] with this contention. It must be borne in mind that these interveners are not voluntary creditors. It must also be borne in mind that while the shipper's causes of action accrued at the time the illegal exactions were made. vet their rights of action did not accrue until the Interstate Commerce Commission acted in January, 1914. rights of action did not become complete until June 15, 1914, which was the limit of time given by the Interstate Commerce Commission for the defendant to pay these claims. In the case of Love v. North American Company, supra, the six months' rule was not technically applied. In the Love case, the orders of the Corporation Commission fixing the rates were made on July 3d, 7th and 31st and on September 14, 1911. The appeal from the orders taken by the railroad company was not decided until December 5, 1912. The judgment of the Supreme Court made the rates approved by it effective as of the dates of the original orders. Therefore, part of the overcharges in the Love case were collected as much as twenty months before the receivership.

However, the six months' rule is not an inflexible rule. The period before the receivership in which claims of this character must accrue depends upon circumstances. The six months' period is usually fixed because usually that is a reasonable period, but it is discretionary with courts to allow a longer period if circumstances warrant it. The time must be reasonable, and what is a reasonable time depends upon the facts of each particular case.

North American vs. Lamont, 69 Fed. 496. Southern Ry. Co. vs. Carnegie, 76 Fed. 496. Blair vs. Ry. Co., 22 Fed. 471.

Mr. Justice Brewer says in Blair vs. R. R. Co. 22 Fed. 471:

"There is no arbitrary time prescribed, and it should be only such reasonable time as, in the nature of things and in the ordinary course of business, would be sufficient to have such claims settled and paid. Six months is the longest time I have noticed as yet given. Ordinarily I think that is ample. Perhaps, in some large concerns, with extensive lines of road and a complicated business, a longer time might be necessary."

Where equity seemed to demand it, the Federal Courts have not hesitated to depart from the short six months' rule. In Atkins vs. Railroad Company, 3 Hughes 307, a claim which accrued twenty-two months before the receiver-[fol. 174] ship was allowed. In Hale vs. Frost, 99 U. S. 389, a three year period was allowed. In Burnham vs. Bowen, 111 U. S. 776, eleven months was allowed. In Union Trust Company vs. Morrison, 125 U. S. 591, a three year period was allowed. In New York Guaranty Trust Company vs. Ry. Co., 83 Fed. 365-370, a claim for cable delivered twenty-six months before the receivership was allowed. In that case the Court said:

"The time that elapsed between the delivery of the cable, and the appointment of the receiver by the state court, would therefore be about twenty-six months, or a little over two years. But it is to be observed that the intervener began suit in the state court of Washington before the receiver was appointed, on October 5, 1893, which would be about twelve months after the delivery of the cable. It recovered judgment on April 3, 1896, which was subsequent to the appointment of the receiver by the state court. The period of time that transpired between the time that the intervener instituted its action and the appointment of the receiver can not properly be included in this computation of time. Such delay as there was, incidental to the proceedings in the state court of Washington, cannot be imputed to, nor tend to the prejudice of the intervener's rights. Without elaborating upon the proposition any further, we are of the opinion that the claim for the cable in question should be made a preferred debt."

It is plain that whatever delay there was in this case, chargeable largely to the vigorous opposition made by the railroad company, can not be imputed to or tend to prejudice the interveners in their rights. The Master rules this point against the defendant and the railway company.

The Master now passes to the third ground upon which interveners base their right to the preferential allowance of their claims—to-wit, that a sound public policy requires that they be made whole. That a railroad company owes a duty to the public to charge only just and reasonable rates is certain. It may be said that the right to charge tolls at all is a part of the prerogative of sovereignty.

Blake vs. Railroad, 19 Minn. 418. Morgan vs. Louisiana, 93 U. S. 217.

The defendant railroad company got the money of these interveners and their assignors into its treasury by violating its public duty to charge only just and reasonable rates. When the Interstate Commerce Commission determined the extent to which the rates were unreasonable and unjust, it became the bounden duty of the railway company to re[fol. 175] store to the shippers the excessive charges exacted from them. This was a duty not only due to the shippers, but it was a duty owing to the public whose laws it had violated. It is a duty which the defendant would have had to comply with had it not gone into the hands of

a court of equity. Surely, it is a duty that a court of equity ought not to aid the defendant in escaping. When the railroad company took this money from the shippers by duress, it took something that it had no right to. Having no right to it, neither its creditors nor its bondholders, nor its stockholders can complain if it is compelled to make restitution. The Master rules this point in favor of the interveners.

Love vs. North American, 229 Fed. l. c. 107. Mercantile Trust Co. vs. St. L. & S. F. R. R. Co., 69 Fed. 193.

The rule announced by Judge Caldwell in the Mercantile Trust Company case, supra, was re-announced by Judge Carland in the Love case, and these two cases on this point contain the strongest statement of the rule of public policy here invoked, which the Master has been able to find in the books. This rule is so obviously just that the Master fails to see how it can be questioned, or its application denied to the facts of this case.

It is asserted by learned counsel for the defendant and the railway company that the Love case is not applicable to this case—first, because in the Love case overcharges were collected in defiance of a state statute, second, because in that case, state made rates were superseded and a bond given for the return of the overcharges, third, because in the Love case, the rates involved were intrastate while in this case they are interstate, and fourth, because in the Love case the interpretation of the laws of Oklahoma [was] involved, while in this case the Act to regulate Commerce is to be interpreted.

The points of difference, if they are points of difference, only add, in the Master's opinion, to the strength of intervener's case. The first mark of differentiation is based upon a wrong premise. In the Love case, the rates were not collected in defiance of a state statute. The statutes of Oklahoma gave the Corporation Commission the power to fix intrastate rates. By this same law a railroad company was given the right of an appeal from the orders of the Commission. Under the statute, in the event of an appeal, the giving of a bond operated to supersede the orders made by the Commission. In the Love case, the Corpora-

[fol. 176] tion Commission made the orders prescribing the rates. The railroad company appealed therefrom and gave a bond which operated during the pendency of the appeal to supersede the orders. While the supersedeas continued, the railroad company had a right to exact the rates charged by it. In the Love case, therefore, the railroad company collected the rates in the teeth of nothing, while in this case, these excessive charges were collected in violation of Section One of the the Act to Regulate Commerce and in the teeth of the order of the Interstate Commerce Commission finding the rate to be unreasonable, unjust and unlawful to the extent of three cents a hundred pounds.

The second point of difference insisted upon by counsel is in the opinion of the Master without merit. In the Love

case, the Court said:

"We must not be deceived as to the true status of this claim, nor allow the bond \* \* \* to blind us to the fact that the claim is one due the shippers for excessive charges paid by them to the Frisco Company for transportation of freight."

While in the Love case, the orders of the Corporation Commission were superseded during the pendency of the appeal by the giving of the bond, in this case there was a continuous violation of the law denouncing the collection of unjust and unreasonable rates. It seems to the Master that in this case there is added reason for the application of the principles announced in the Love case.

The third point of difference urged by counsel seems to present a distinction without a difference. In both cases the railroad company took money from the shipper to which it was not entitled. As to the fourth point, the Master is unable to see wherein the Court in the Love case in-

terpreted any law of Oklahoma.

In the Love case the Court found that in collecting a rate in excess of that finally fixed by the judgment of the Supreme court of Oklahoma, the railroad company had exacted from the shipper an excessive charge to which it was not entitled. While during the pendency of the appeal it was not violating any law, yet it obtained from the shipper an excessive charge for the transportation of freight.

Even if we were to give to Section Six of the Act to Regulate Commerce the effect contended for by the defense, we would only thereby make the Love case and this case [fol. 177] exactly analogous. But, as the Master has here-tofore ruled, the exaction of the excess charges in this case were unlawful from the beginning. In the opinion of the Master, therefore, there is added reason for the application of the principle in the Love case to this case. The learned counsel for defendant raised six other points as to the Love case, all of which have been carefully examined and are found to be without merit.

# Supplemental Petitions of Interveners

The interveners base their right to recover under their supplemental petitions the unpaid attorneys' fees, taxed as costs, on a different equity than that involved in their main case. It is alleged in the supplemental intervening petitions that the receivers were by the order of this Court authorized to defend all suits against the defendant railroad company, that the receivers, through their attorneys, appeared in Cause No. 4308 in the District Court of the United States for the Western Division of the Western District of Missouri and conducted the defense of said cause in the District Court, and appealed the same to the Circuit Court of Appeals; that after the appeal to the Circuit Court of Appeals the railway company conducted the defense of said cause; that the receivers, when the appeal was taken to the Circuit Court of Appeals, caused a surety company to make an appeal bond in the name of the defendant for \$3,500.00, conditioned that the defendant would answer all costs if it failed to make good its appeal; that the amount of the attorneys' fees adjudged by the Court to intervener E. B. Spiller, and taxed as costs, was \$4,675.32; that upon the affirmance by the Supreme Court of the United States of the judgment of the District Court, the railway company paid the clerk's costs and the sum of \$3,351.19 of the attorneys' fees taxed as costs, aggregating \$3,500,00, the penalty of the bond; that there was a balance left unpaid on the attorneys' fees taxed as costs of \$1,324.13; that the costs consisting of attorneys' fees were incurred and made by the action of the receivers in defending and litigating said Cause No. 4308. The Master finds these facts to be true. When the receivers were appointed, they were by the order of this Court authorized to

"Institute and prosecute such suits in their own names as receivers, or in the name of the company, as their attorneys may advise, to defend such suits as may be brought against them and those now pending or hereafter brought [fol. 178] against the company, which affect or may affect the property of which they are now or may become receivers."

In the opinion of the Master, neither the receivers nor the railway company are legally liable for these costs. The judgment for costs is against neither the receiver nor the railway company. Ought they in equity to be paid by the receivers? Should the Court in doing equity, order these costs to be treated as a part of the expense of the administration?

"Equity delights to look behind the forms in which things are clothed at the real substance of them."

While it may be that the receivers did not incur these costs, yet they did cause them to be incurred. In the name of the railroad company, they vigorously and persistently resisted the intervener. They did this under the provision of the order of their appointment which directed them to defend all suits against the defendant which affect or may affect the property of which they are now or may become the receivers." They did this undoubtedly for the protection of the property. The defendant itself had no interest in the outcome of the litigation. The only persons really interested in the defense were the receivers, acting as the officers of the Court. To all intents and purposes, this Court was really conducting the defense. If the receivers had become parties to the suit, they would, of course, be legally liable for the costs. As has been stated, this Court was the real party defendant, acting through its officers, the receivers. It seems to the Master that it would not be equitable for a court of equity to cause these costs to be incurred and then refuse to compel its officers to pay them Of course, if the receivers should pay them, then the railway company should pay them.

The Master rules that the claim of intervener, E. B. Spiller, for attorneys' fees taxed as costs in case No. 4308, should be allowed, and that an order should be made upon the railway company to make payment thereof.

The claim of E. B. Spiller et al. in cause No. 4320 for \$365.29 attorneys' fees, taxed as costs, should be allowed

for the same reason and ordered paid.

Thomas T. Fauntleroy, Special Master.

# [fol. 179] IN UNITED STATES DISTRICT COURT

# [Title omitted]

#### Consolidated Cause Final

In the Matter of the Intervention of E. B. Spiller and Others. Intervening Petition and Supplemental Intervening Petition No. 402.

In the Matter of the Intervention of E. B. Spiller. Intervening Petition and Supplemental Intervening Petition No. 403

Motion for Consolidation of Petitions for Intervention—Filed March 8, 1922

Come now St. Louis-San Francisco Railway Company and St. Louis and San Francisco Railroad Company, parties hereto, and respectfully represent and state to the court:

That at the hearing before the Special Master heretofore appointed in this cause, the above interventions were jointly heard by said Special Master and tried and considered as one cause by said Special Master and the parties hereto, and that the Special Master has filed a joint report herein in said interventions as a consolidated cause, yet in fact no order has been made consolidating said interventions; that it is to the interest of all the parties herein that an order be entered consolidating said interventions into one cause for further hearing and determination.

Wherefore, your applicants pray that an order be made and entered herein consolidating said interventions into one cause in the manner and for the purposes herein stated.

W. T. Evans, E. T. Miller, Solicitors for Applicants.

# IN UNITED STATES DISTRICT COURT

Order Consolidating Petitions of Intervention—Filed March 8, 1922

The court having duly heard and considered the application of St. Louis-San Francisco Railway Company and [fol. 180] St. Louis and San Francisco Railroad Company filed herein for the making and entry of an order consolidating the above styled interventions, and the court now being fully advised in the premises,

It is ordered that said interventions be, and the same hereby are, consolidated into one consolidated cause under the style "In the Matter of the Intervention of E. B. Spiller, Et Al., "Consolidated Cause," for all purposes for the further consideration and determination thereof.

(Signed) Walter H. Sanborn, Senior Circuit Judge.

St. Louis, Missouri, March 8th, 1922.

We hereby consent to the making and entry of the foregoing order.

(Signed) D. A. Murphy, S. H. Cowan, John S. Leahy, Walter H. Saunders, Solicitors for said Interveners.

### IN UNITED STATES DISTRICT COURT

### [Title omitted]

### Consolidated Cause Final

Consolidated under the Style "In the Matter of the Interventions of E. B. Spiller et al. Consolidated Cause"

Exceptions of St. Louis and San Francisco Railroad Company to Report of Special Master—Filed March 18, 1922

[fol. 181] Comes now St. Louis and San Francisco Railroad Company, a party herein, and excepts to the report of the Special Master filed in this cause in the matter of the intervening petition and petition supplemental thereto of E. B. Spiller et al., No. 402, and the intervening petition and petition supplemental thereto of E. B. Spiller, No. 403, said interventions having been duly consolidated under the style "In the Matter of the Interventions of E. B. Spiller et al., Consolidated Cause," and for cause of exceptions states.

1. The Special Master erroneously recommended to the Court (Rep. pp. 3-4) that judgment be entered herein in favor of interveners, E. B. Spiller, et al., in the sum of \$3,652.97, with interest thereon, and the sum of \$365.29 as attorneys' fees, and each of said sums, and that the same be adjudged prior in lien and superior in equity to the refunding mortgage and the general lien mortgage of defendant and directed to be enforced against the property conveyed to St. Louis-San Francisco Railway Company, and that the costs of this proceeding be taxed against defendants herein.

The Special Master should have recommended to the Court that a judgment be entered herein disallowing said claims, and each of them, of said interveners, and that the costs of the proceeding be taxed against said interveners, or that said sum of \$3,652.97 be allowed as a general unsecured creditor's claim, and said sum of \$265.29 be disallowed.

2. The Special Master erroneously recommended to the Court (Rep. pp. 2-3) that judgment be entered herein in

favor of intervener E. B. Spiller, in the sum of \$30,212.31, with interest thereon and the sum of \$1,235.13 as attorneys' fees, and each of said sums, and that the same be adjudged prior in lien and superior in equity to the refunding mortgage and the general lien mortgage of defendant and directed to be enforced against the property conveyed to St. Louis-San Francisco Railway Company, and that the costs of this proceeding be taxed against defendants herein.

The Special Master should have recommended to the Court that a judgment ben entered herein disallowing said claims, and each of them, of said intervener, and that the costs of this preceeding be taxed against said intervener, of that said sum \$30,212.31 be allowed as a general unsecured creditor's claim, and said sum of \$1,235.13 be disallowed.

3. The Special Master erroneously found as a conclusion of fact (Rep., p. 21) that the Interstate Commerce Comis-[fol. 182] sion on August 16th, 1905, found that the rates charged and collected by defendant involved in this intervention were unlawful.

The Special Master should have found as a conclusion of fact that the rates so charged and collected were the only lawful rates that defendant was permitted to charge and collect, and that the Interstate Commerce Commission did not pronounce said rates unlawful.

4. The Special Master erroneously found as a conclusion of fact (Rep., p. 22) that the Interstate Commerce Commission on April 14th, 1908, pronounced the rates so charged and collected by the defendant to be unlawful.

The Special Master should have found as a conclusion of fact that said rates were the only lawful charges that could have been charged and collected by defendant, and that said Commission did not pronounce said rates unlawful.

5. The Special Master erroneously found as a conclusion of fact (Rep., p. 23) that the reparation case before said Commission was proceeded with interveners continuously and without unnecessary delay.

The Special Master should have found as a conclusion of fact that interveners failed to proceed with said reparation case continuously and without unnecessary delay.

6. The Special Master erroneously found as a conclusion of fact (Rep., p. 24) that said Commission had ordered de-

fendant to pay freight charges which defendant had illegally and unlawful exacted from interveners.

The Special Master would have found as a conclusion of fact that defendant did not illegally or unlawfully exact any freight charges from interveners.

7. The Special Master erroneously found as a conclusion of fact (Rep., pp. 28-29) that prior to August 29th, 1916, neither interveners nor their attorneys had any notice or knowledge of any order made by this court fixing the time with which claims should be filed in this cause and in this court, and that on said date attorneys for interveners learned for the first time that such an order had been made and that the time fixed by the order had then expired.

The Special Master should have found as a conclusion of fact that interveners and their attorneys not only had actual [fol. 183] notice of the order of this court fixing the time within which claims should be filed herein, but that they were chargeable in law and in equity with notice thereof, both by reason of the fact that such notice was duly published as required by this court and by reason of the fact that interveners and their attorneys were familiar with and charged with notice of proceedings in this cause, including the orders fixing the time within which claims should be filed herein.

8. The Special Master erroneously found as a conclusion of fact (Rep., pp. 30-31) that under the reorganization plan the holders of the \$5,000,000 of first preferred stock of the old company, and the holders of \$16,000,000 of second preferred stock of the old company were to receive a bonus in preferred and common stock in the new company; that the

"Public Service Commission of Missouri refused to approve that part of the plan and the plan was modified, and under the plan as modified, the holders of five million dollars of first preferred stock of the railroad company were to receive, and did receive, five million dollars of the new common stock, the holders of the sixteen million dollars of second preferred stock of the old company were to receive, and did receive, sixteen million dollars of the common stock of the new company and the holders of the twenty-nine million dollars of common stock of the old were to receive, and did receive, \$24,650,000,00 of the common stock of the new

company. In other words, the stockholders of the old company were to receive, and did receive, \$45,650,000.00 of the stock of the new company as representing their equity in the properties without payment of anything by them therefor.

"The fact that under the plan, these stockholders were required to buy \$50.00 worth of the prior lien bonds for each share of stock does not affect the situation. These bonds were secured by a first mortgage on all of the properties of the reorganized company and presumptively were

worth par.

"In the application filed by the reorganization managers and by the St. Louis-San Francisco Railway Company with the Public Service Commission for authority to issue securities, it was stated and nown that the value of the railroad properties and of properties not used for railroad purposes and the cash to be received from the receivers was \$321,776,000.00. This was the value accepted and found to exist by the Public Service Commission of Missouri, and [fol. 184] is accepted as the value of such properties by the Master. The total of the securities, bonds, preferred stock and common stock of the new, or St. Louis-San Francisco Railway Company, to be issued under the plan as authorized by the Public Service Commission, was \$321,688,886.00, or so much thereof as might be necessary."

The Special Master should have found that every stockholder, every bondholder and every unsecured creditor who had complied with the orders of this court by filing his claim herein as thereby required, had received an offer to permit him to participate in the benefits of the purchase of defendant's property on the equitable basis upon which others of his class were permitted to participate therein under the plan of reorganization, and that the purchase price of said property was not only the amount bid at the sale, but that amount plus the value of all that part of the bonds, unsecured claims and stock above the amount paid thereon out of the amount bid, which was exchanged for stock and bonds in the new Railway Company.

The Special Master should have further found as a conclusion of fact and of law that this court had previously and particularly in the case of St. Louis-San Francisco Railway Company vs. M'Elvain, 253 Fed. 123, adjudged and decreed that the sale of said property of defendant and the acquisition thereof by St. Louis-San Francisco Railway Company was in all things fair, valid and equitable and not subject to attack by interveners in this proceeding, or elsewhere.

9. The Special Master erroneously found as a conclusion of fact and of law (Rep., p. 32) that

"No offer was ever made by the railroad company or the receivers, or by anybody else to pay the claims of interveners and no tender of any payment either in money or otherwise was ever made by any one to them. On the contrary, the railroad company, the receivers and the railway company, through their attorneys, have constantly since the making of the order of reparation by the Interstate Commerce Commission in 1914, and prior thereto, contested every effort made by interveners to establish their claims. The interveners have from the beginning shown the utmost diligence in the prosecution of their claims and have been guilty of no laches."

The Special Master should have found as a conclusion of fact and of law that no offer was required to be made to any unsecured creditor who had not filed his claim in this cause pursuant to the orders of this Court, and further that [fol. 185] interveners have been guilty of such neglect and laches as prevent any consideration being given to their claims herein.

10. The Special Master erroneously found as a conclusion of fact (Rep., p. 33) that from August 16th, 1905, until November, 1908, defendant exacted from interveners and their assignors freight charges which had been found by the Interstate Commerce Commission to be unreasonable, unjust and unlawful, and that said freight charges were exacted in the face of the positive finding of said Commission that they were unjust, unreasonable and unlawful.

The Special Master should have found as a conclusion of fact that the rates so collected by defendant were the only lawful rates that it was entitled to collect.

11. The Special Master erroneously found as a conclusion of fact (Rep., p. 34) that

"From June 29, 1906, until May 27, 1913, the date when receivers were appointed herein on the bill of complaint of the North American Company, a general creditor, the net operating income of the railroad company was \$92,471,350.28. In other words, the operating income exceeded the operating expense, including taxes, by that sum. From July 1, 1912, to May 27, 1913, operating income exceeded operating expenses, including taxes, by \$11,752,379.60. In fact, there was not a year from June 30, 1906, to May 27, 1913, except the year ending June 30, 1908, when the operating income exceeded operating expenses, including taxes, by \$9,944,600.89—that the operating income did not exceed the operating expenses including taxes by over \$11,000,000.00.

"Foreclosure proceedings by the bondholders were first started May 22, 1914, or nearly one year after the receivers were appointed on the bill of complaint of the general creditor, North American Company. From May 27, 1913, to April 30, 1914, the operating or current receipts exceeded the operating expenses, including taxes, by \$12,930,858.89. the earnings being during such period \$48,380,219.16 and the operating expenses being \$35,449,360.17. During every year from June 30, 1906, to May 27, 1913, the defendant company paid large sums in excess of the excess charges collected from interveners and their assignors, by way of interest on its mortgaged indebtedness and for betterments and improvements to its railroad and equipment and by way of purchase of new equipment. From May 27, 1913, to May 22, 1914, the receivers paid out large sums by way of betterments to road and equipment and by way of interest on its mortgaged indebtedness."

[fol. 186] The Special Master should have found as a conclusion of fact from the facts admitted in this cause, that the gross receipts of defendant during each year from June 1st, 1906, to May 27th, 1913, exceeded defendant's operating expenses in an amount in excess of interveners' claims, including interest; that during each of said years defendant expended large sums of money for improvements, equipment, interest on bonded indebtedness and in current expenses incurred in the ordinary operation of its lines of railroad; that during the period of the receivership, the gross operating receipts of said receivership each year were

in excess of the operating expenses of said receivership, such excess amounting each year to more than the total of interveners' claims with interest; that during the period of said receivership, said Receivers paid out under orders of this court large sums of money for improvements, betterments, equipment, interest on bonded indebtedness and for current expenses for the operation of the lines of railroad during said receivership, and that the term "large sums of money" as used herein means at least several hundred thousand dollars.

12. The Special Master erroneously found as a conclusion of fact (Rep., p. 35) that during each year from August, 1906, to May, 1913, there was at all times in the treasury of defendant an amount of money in excess of interveners' claims, with interest, and that on May 27, 1913, defendant had on hand and turned over to said Receiver over \$600,000.00 in cash.

The Special Master should have found as a conclusion of fact that during said years defendant at all times had cash in hand in excess of said claims of interveners, with interest thereon, and that defendant, upon the appointment of Receivers, turned over to said Receivers the sum of approximately \$338,000.00.

13. The Special Master erroneously found as a conclusion of fact (Rep., p. 35) that freight charges collected by defendant were not kept by defendant in a separate fund, but were mingled with the general receipts of defendant, and that the depositories of defendant had no instructions to keep said charges in a specific fund, and did not keep the same in a separate account, and that defendant had always on hand in its treasury an amount in excess of the aggregate of interveners' claims, with interest.

The Special Master should have found as a conclusion of fact that said sums collected from interveners as alleged [fol. 187] overcharges were not kept by defendant in a separate or designated account or fund, nor separated from other gross receipts of defendant, derived from the operation of its lines of railroad; that said moneys so collected by defendant were deposited in banks with other moneys of defendant in defendant's general account, and said banks had no instructions from defendant to keep said moneys in

a specific fund, nor to refrain from paying the same out in the ordinary course of business on defendant's checks against its fund in said banks, nor did said banks keep said moneys in a separate account, and that defendant checked out of its deposits in each of said banks during each year from June 1st, 1906, to May 27th, 1913, sums of money largely in excess of said alleged overcharges, and deposited in said banks during each of said years sums of money largely in excess of said alleged overcharges—all as contained in the agreed stipulation of facts filed in this cause.

14. The Special Master erroneously found as a conclusion of fact (Rep., p. 35), that

"Subsequent to the receivership the claims of the Corporation Commission of the State of Oklahoma, for overcharges exacted from shippers in Oklahoma, amounting to \$76,627.35, was allowed as a preferred claim and paid. A claim for \$12,124.51, in favor of a surety company, was allowed on account of similar overcharges as a preferred claim and paid. There was no other depletions of the fund turned over by the railroad company to the receivers. After the appointment of the receivers, the receivers paid out large sums of money for supplies, etc., purchased prior to the receivership. On the other hand, the railroad company turned over to the receivers, and the receivers received, supplies, etc., of equal or greater value."

The Special Master should have found as a conclusion of fact that the claims against defendant adjudged by the Court as preferential, and which the Receivers were directed by the Court to pay, and did pay during the first month of the receivership, were largely in excess of the amount of money turned over by defendant to said Receivers on their appointment, and that all of the money received by said Receivers from defendant, as aforesaid, was paid out by said Receivers in discharging such claims long prior to any assertion by interveners herein of their said claims.

15. The Special Master erroneously found as a conclusion of fact (Rep., p. 36) as follows:

"After the receivers were appointed they paid out large sums of money to other railroad companies in settlement

[fol. 188] of car service and traffic balances. Settlement between railroads, however, on this kind of business were made on the basis of net balances, and while for the first few days of the receivership the disbursements on account of this class of claims exceeded the receipts, yet the receipts on account of this class of business accruing prior to the receivership largely exceeded the disbursements on account of this class of business. According to the first bi-monthly report of the receivers, the receipts on account of this class of business accruing prior to the receivership were \$395,-374.71 and the disbursements \$396,286.58. According to the second bi-monthly report of the receivers the recepits were \$229,953.84 and the disbursements \$191,198.71. From December 31, 1908, to May 15, 1913, the defendant railroad company issued \$55,257,220.00 of its general lien fifteen twenty-year gold bonds and between 1910 and 1912 it issued \$2,444,000,00 of its secured gold notes, and between June 21, 1909, and November 21, 1911, the Kansas City, Ft. Scott & Memphis issued \$3,421,950.00 of its refunding mortgage four per cent bonds. There is no showing for what purpose these bonds were issued or to what use the proceeds were put. During all of said years when these bonds were being issued, the net operating income, that is to say—the excess of operating income over operating expenses, including taxes—was in excess of \$11,000,000.00 each year."

The Special Master should have found as a conclusion of fact that the first bi-monthly report of said Receivers shows receipts in settlement of car service and traffic balances with other railroads of \$395,374.21, and disbursements of \$396,-286.58, said receipts representing accrued items on business prior to the receivership, and that during the same period the Receivers collected on receivership business only \$4,377.15; that the disbursements above stated were accrued payments on business transacted prior to receivership, and the amount accrued on receivership business during such period was \$32,754.63; that said Receivers received, as shown by said bi-monthly report, on business accrued prior to their appointment, \$2,245,153.79, and paid on business accrued prior to their appointment, \$3,985,121.02, and that in addition to the payment last aforesaid said Receivers also paid prior to February 18th, 1914, preferred claims against defendant, which were duly presented, filed and heard by the Special Master, aggregating \$2,229,950.47.

16. The Special Master erroneously found (Rep., p. 37) all of the issues raised by the pleadings in favor of interveners.

[fol. 189] The Special Master should have found all of the issues raised by the pleadings in favor of this exceptor.

17. The Special Master erroneously found as a conclusion of law (Rep., p. 39) that the pleas in bar of this exceptor are without merit.

The Special Master should have found as a conclusion of law that said pleas in bar constituted a complete bar to interveners' claims herein.

18. The Special Master erroneously found as a conclusion of law (Rep., p. 40) that interveners were not guilty of laches, but, on the contrary, were persistently diligent.

The Special Master should have found as a conclusion of law that interveners were guilty of laches, and that they were persistently lacking in diligence, and that it was the duty of interveners, in order to have a hearing of their claims, to file the same in this court within the time and as provided by the interlocutory decree and subsequent orders extending the time therein provided.

19. The Special Master erroneously found as a conclusion of law (Rep., p. 42) that neither the interveners nor their counsel had notice or knowledge of the making of the interlocutory decree, or the final decree, until long after the time therein fixed for filing claims had expired.

The Special Master should have found as a conclusion of law that both interveners and their counsel had notice or knowledge, actual, or, if not actual, constructive, of the provisions of said interlocutory decree and said final decree long prior to February 1st, 1916.

20. The Special Master erroneously found as a conclusion of law (Rep., p. 42) that the fact that holders of other claims pending before the Interstate Commerce Commission filed their claims herein as required by the interlocutory decree is not material, so far as interveners are concerned, and that if interveners had filed their claims herein as required by the interlocutory decree, an effort would have been made to have them dismissed on the ground that the procedure prescribed by the Interstate Commerce Act was exclusive.

The Special Master should have found as a conclusion of law that it was the duty of interveners, notwithstanding the pendency of their claims with the Interstate Commerce Commission, to file said claims herein pursuant to the interlocutory decree if they desired to protect their rights in respect thereof, and that their failure so to do bars the confol. 190] sideration of said claims in this proceeding.

21. The Special Master erroneously found as a conclusion of law (Rep., p. 43) that no offer of settlement of any kind was ever made to interveners, and that, by reason thereof, under the authority of Northern Pacific Ry. Co. vs. Boyd, there has never been any distribution of the assets of this estate.

The Special Master should have found as a conclusion of law that interveners, by failing to file their claims as provided by the interlocutory decree, forfeited all rights to the consideration thereof in this cause, and should have further found, as was held by this Court in the McElvain case, supra, that the contract made between the Court and this exceptor in this cause was and is in all things just and valid, and that the same cannot now be attacked by interveners.

22. The Special Master erred in his conclusion of law (Rep., pp. 43 and 44) construing the purpose and effect of the final decree entered in this cause, and particularly Articles IX and X thereof, and in holding that claims such as these might be filed after the entry of said final decree.

The Special Master should have found as a conclusion of law that paragraph B, Article IX, of the final decree relates to only such claims as were filed pursuant to the terms of the interlocutory decree and the nature of which had not been at the time of the entry of the final decree determined by the Court, and that by Article X of said final decree the Court contracted with this exceptor that it should not be required to pay claims which had not been filed pursuant to the terms of the interlocutory decree except such claims as arose subsequent to the entry of said decree, and then only on the conditions prescribed in the final decree.

23. The Special Master erroneously found as a conclusion of law (Rep. p. 44) that the word "arise" used by the Court in Clause 2, Article X, of the final decree as follows: "Any claim or demand which may arise after the entry of this decree," is not used in the sense of "accrue."

The Special Master should have found as a conclusion of law that interveners' claims arose long prior to the entry of said final decree, and that the same were therefore barred thereby.

24. The Special Master erroneously found as a conclusion of law (Rep., p. 44) that interveners' claims were such claims as the Receivers were required to list with this Court [fol. 191] under the provisions of Article X of the final decree.

The Special Master should have found as a conclusion of law that under said Article X of the final decree said Receivers were only required to list with this Court such claims against defendant as said Receivers had at that time been informed were claimed to be prior in lien or superior in equity to the Refunding Mortgage or General Lien Mortgage of defendant, and should have further found as a conclusion of law and of fact that interveners did not attempt to present their claims herein, or to assert any claim of preference in respect thereof, until long subsequent to the date of the entry of said final decree.

25. The Special Master erroneously found as a conclusion of law (Rep., p. 44) that interveners' claims arose after the entry of the final decree.

The Special Master should have found as a conclusion of law from the facts in this case and from the admissions of interveners, that their said claims arose long prior to the entry of the final decree.

26. The Special Master erroneously found as a conclusion of law (Rep., pp. 44 and 45) that the fact that no appeal was taken by interveners from the final decree does not affect interveners' rights to assert their claims, and that interveners had no notice or knowledge of either the interlocutory decree or the final decree, and that they were not parties to the cause either personally or by representation.

The Special Master should have found as a conclusion of law that interveners are attempting to assert their claims herein pursuant to the terms of said final decree; that they had notice or knowledge of the interlocutory decree and the final decree; that they were, when said decrees were entered, parties to this cause either personally or by representation, and that by failing to have either the final decree or the order confirming the sale amended by the Court to protect their alleged claims, and by failing to appeal from the refusal of the Court to so amend said decrees, or either of them, they are estopped to assert their claims in this proceeding.

27. The Special Master erroneously found as a conclusion of law (Rep., p. 45), that St. Louis-San Francisco Railway Company took defendant's property subject to interveners' claims.

[fol. 192] The Special Master should have found as a conclusion of law that St. Louis-San Francisco Railway Company took defendant's property free and undischarged of all liability in respect of interveners' claims.

28. The Special Master erroneously found as a conclusion of law (Rep., p. 45) that the sale of defendant's property, made and confirmed by this Court, and under which St. Louis-San Francisco Railway Company claims, was a mere form and void between interveners and St. Louis-San Francisco Railway Company.

The Special Master should have found as a conclusion of law that he was bound by the orders and decrees in this cause adjudicating and decreeing that said sale was in all respects valid, and that he was bound by the opinion of this Court in the McElvain case, supra, so holding.

29. The Special Master erroneously found as a conclusion of law (Rep., p. 45) that the Receivers, the reorganization managers and St. Louis-San Francisco Railway Company, all knew of interveners' claims, and that it was claimed that they were prior in right and superior in equity to the claims of all other creditors, including bondholders.

The Special Master should have found as a conclusion of law that at the time the contract was made between the Court and St. Louis-San Francisco Railway Company, interveners had not presented their claims as required by the interlocutory decree, or otherwise, nor had they asserted any priority in right of superiority in equity in respect thereof to the claims of other creditors, or bondholders.

30. The Special Master erroneously found as a conclusion of law (Rep., p. 46) that the rule applied in the Boyd case applies in this case.

The Special Master should have found as a conclusion of law that this Court, whose servant he is, had expressly held in said McElvain case that the rule applied in the Boyd case does not apply to this case.

31. The Special Master erroneously found as a conclusion of law (Rep., p. 46) that interveners are not barred from a presentation and consideration of their claims on their merits, either by the orders limiting the time within which claims were to be presented, or by inexcusable laches of in[fol. 193] terveners.

The Special Master should have found as a conclusion of law that these questions were not decided by Judge Sanborn in the order permitting the filing of these claims, but that these interventions were referred to the Special Master in order that he might report his conclusions to the Court on all questions involved, including the pleas in bar, contained in the answer of this exceptor.

32. The Special Master erroneously found as a conclusion of law (Rep., page 47) that the collection of an excessive freight rate by a railroad company is as to the excess over a reasonable rate wrongful and unlawful, and that such collection is under duress, and that such railroad company becomes a trustee ex maleficio for the shipper.

The Special Master should have found as a conclusion of law that the alleged excessive rates involved herein were not collected under duress; that they were not wrongfully and unlawfully collected, and that defendant did not be-

come a trustee ex maleficio for interveners.

33. The Special Master erroneously found as conclusion of law (Rep., page 49) that it will be presumed that the money collected as excess charges from interveners was a part of the money in the treasury of the company which

passed to the Receivers.

The Special Master should have found as a conclusion of law that, upon the admitted facts in evidence, whatever excess charges were collected from interveners prior to November, 1908, were long since expended by defendant, and should have further found that interveners truthfully stated that said excess sums of money were used by defendant as were other freight charges collected by it.

34. The Special Master erroneously found as a conclusion of law (Rep., page 49) that said excess overcharges were unlawfully collected.

The Special Master should have found as a conclusion of law that in collecting the regular tariff rates defendant collected the only rate that it could lawfully collect, and that defendant could not unlawfully collect the only lawful rate.

35. The Special Master erroneously found as a conclusion of law (Rep., page 53) that defendant became a trustee ex maleficio for interveners.

[fol. 194] The Special Master should have found as a conclusion of law that defendant did not become a trustee ex maleficio for interveners.

36. The Special Master erroneously found as a conclusion of law (Rep., page 53) that Section 16 of the Act to Regulate Commerce did not make interveners a general creditor of defendant and entitle interveners only to a judgment for damages to collect alleged overcharges.

The Special Master should have found as a conclusion of law that the Interstate Commerce Act prescribes the exclusive remedy for an overcharged shipper, and that that remedy is an action for damages in the event the railroad company fails to make reparation under order of the Commission.

37. The Special Master erroneously found as a conclusion of law (Rep., page 56) that the Act to Regulate Commerce was not exclusive as to the remedies of a shipper, but that a shipper could still pursue the common-law remedies.

The Special Master should have found that said Act to Regulate Commerce was exclusive on this question.

38. The Special Master erroneously found as a conclusion of law (Rep., page 57) that there is nothing in the Act of Regulate Commerce depriving shippers of the remedy pursued in this case.

The Special Master should have found as a conclusion of law that the Act to Regulate Commerce provides the only remedy to be pursued by overcharged shippers thereunder.

39. The Special Master erroneously found as a conclusion of law (Rep., page 59) that intervener's claims are pre-

ferential under the rule that the test of the preferential equity of a claim is its consideration, and in finding that the facts in the case of Love v. North American Company, referred to in the Special Master's report, are identical with the facts in this case.

The Special Master should have found as a conclusion of law that the only relation existing between defendant and interveners was that of debtor and creditor, and that interveners were merely a general unsecured creditor without preference, and that interveners' claims are entitled to no priority in lien or superiority in equity over the mortgages of defendant, and that the facts in this case are wholly different from the facts in said Love case.

[fol. 195] 40. The Special Master erroneously found as a conclusion of law (Rep., P. 60) that it is presumed that interveners' money always remained in the treasury of the company, and that it operated to swell the funds in the treasury of the defendant, and thus made it possible, or, at least, aided in making it possible, for the bondholders to receive the interest on their bonds.

The Special Master should have found as a conclusion of law that upon the undisputed evidence in this case, that interveners' money did not remain in the reasury of the company, and did not constitute any portion of the fund turned over by defendant to said Receivers.

41. The Special Master erroneously found as a conclusion of law that the case of C. & A. R. Co. vs. Trust Compony, 225 Fed. 940, has no application to this case.

The Special Master should have found as a conclusion of law that upon the authority of said Trust Company case the claims herein involved are not preferential.

42. The Special Master erroneously found as a conclusion of law (Rep., p. 62) that the six-months rule in respect to preferential claims obtaining in this circuit does not apply to this case, and that said rule was not applied in the Love case, and that the over charges involved in the Love case were not collected within the six-months period.

The Special Master should have found as a conclusion of law that the six-months rule should apply to interveners' claims; that that rule was observed and applied in the Love case, and that the overcharges in the Love case were collected within said six-months period.

43. The Special Master erroneously found as a conclusion of law (Rep., p. 64) that defendant got the money of inpresenting interveners' claims in this case cannot be imputed to or tend to prejudice interveners' rights.

The Special Master should have found as a conclusion of law that interveners were negligent in the presentation of their claims, were guilty of inexcusable laches, and that,

therefore, their claims should be rejected.

44. The Special Master erroneously found as a conclusion of law (Rep., p. 64) that defendant got money of interterveners by violating its public duty, and that it took something that it had no right to do, and that neither defend-[fol. 196] dant's creditors, its bondholders nor its stockholders can complain if it is compelled to make restitution.

The Special Master should have found as a conclusion of law that defendant did not collect interveners' money in violation of its public duty, and that it had the right to collect interveners' money for the services performed for

interveners.

45. Special Master erroneously found as a conclusion of law (Rep., p. 65) that in the Love case the rates there involved were not collected in defiance of a state statute.

The Special Master should have found, as a conclusion of law, that an order of the Corporation Commission of Oklahoma prescribing rates was a legislative act, having the effect of a statute, and that the overcharges in that case were collected in defiance of a state statute.

46. The Special Master erroneously found as a conclusion of law (Rep., p. 66) that interveners' claims were collected by defendant in continuous violation of law.

The Special Master should have found, as a conclusion of law, that said rates were collected in conformity with law.

47. The Special Master erroneously found as a conclusion of law (Rep., p. 66) that althought overcharges involved in the Love case were intrastate, while interveners' claims are for interstate overcharges, yet there is no distinction in principle respecting the nature of the overcharges and the relative rights of the parties overcharged.

The Special Master should have found as a conclusion of law that interveners' claims were directly affected by the Act to Regulate Commerce, and that the Oklahoma claims were not at all affected thereby, and that the Oklahoma claims were not at all affected thereby, and that in the Oklahoma case the interpretation of the laws of Oklahoma was involved, while in this case the interpretation of the Act to Regulate Commerce is involved.

48. The Special Master erroneously found as a conclusion of law (Rep., p. 68) that the attorneys' fees involved in the supplemental intervening petition, while not a proper legal charge against either the Receivers or St. Louis-San Francisco Railway Company, yet in equity should be treated

as a part of the expense of the administration.

The Special Master should have found as a conclusion of law that said Receivers were not chargeable, either at law [fol. 197] or in equity, for any portion of said attorney's fees involved in the supplemental petition, as said fees were incurred subsequent to the surrender by said Receivers of the railroad and property of defendant to St. Louis-San Francisco Railway Company, and that they are not legally chargeable to St. Louis-San Francisco Railway Company, in this proceeding, if at all.

49. The Special Master erroneously found as a conclusion of law (Rep., p. 69) that the claims of interveners for attorneys' fees should be allowed as presented, and that an order should be made upon St. Louis-San Francisco Railway Company to pay the same.

The Special Master should have found as a conclusion of law that St. Louis-San Francisco Railway Company was and is under no obligation, either legal or equitable, to pay

said attorneys' fees, or any part thereof.

50. The Special Master should have found as a conclusion of fact and of law that all the overcharges collected from interveners were paid out by defendant as current expenses of operation in the ordinary course of its business long prior to the appointment of Receivers in this cause, and to the failure of the Special Master to so find exceptor now excepts.

- 51. The Special Master should have found as a conclusion of law that under the contract between the Court and St. Louis-San Francisco Railway Company in this case, St. Louis-San Francisco Railway Company did not assume, nor has it otherwise assumed, payment of interveners' claims, or any part thereof, and to the failure of the Special Master to so find exceptor now excepts.
- 52. The Special Master should have found as a conclusion of law that he was bound by the orders, decrees and opinions of this Court, protecting St. Louis-San Francisco Railway Company from being subjected to liability in respect of the payment of interveners' claims, and to the failure of the Special Master to so find exceptor now excepts.
- 53. The Special Master should have found as a conclusion of law that interveners are not seeking by their pleadings herein to establish a trust fund in respect of their claims, and should not have enlarged the scope of the pleadings by permitting a recovery upon that theory, and to the failure of the Special Master to so find exceptor now excepts.
- [fol. 198] 54. The Special Master should have found as a conclusion of law that neither fraud, actual or constructive, was or is chargeable to defendant in respect of the collection of said alleged overcharges, and that by reason thereof no trust ex maleficio was created, and to the failure of the Special Master to so find exceptor now excepts.
- 55. The Special Master should have found as a conclusion of law that neither said alleged overcharges, nor the proceeds thereof, went into a specific fund or into a specific identified piece of property which came to the hands of the Receivers, and to the failure of the Special Master to so find exceptor now excepts.
- 56. The Special Master should have found as a concluseion of law that aside from the evidence in this case the legal presumption prevails that the moneys collected from interveners by defendant were paid out in the order in which they were paid in, and that none of said moneys passed into the hands of the Receivers upon their appointment, and to the failure of the Special Master to so find exceptor now excepts,

57. The Special Master should have found as a conclusion of law that there was no merit to interveners' claims, either those presented by the petition, or by the supplement thereto, and should have recommended that an order be entered herein dismissing said claims, and each of them, and to the failure of the Special Master to so find exceptor now excepts.

Wherefore, this exceptor prays that these, its exceptions to the report of the Special Master, be sustained, that said report be not confirmed, that interveners' said claims and each of them be disallowed, and that the intervening petition and supplement thereto be dismissed.

W. F. Evans, E. T. Miller, Solicitors for St. Louis and San Francisco Railroad Company, Exceptor.

"The exceptions of the St. Louis-San Francisco Railway Company to said report of said special master are identical with the exceptions of the St. Louis & San Fran-[fol. 199] cisco Railroad Company, to said report except for the change in name, and except that in exceptions numbered 48, 49, 50, 51 and 52, the name St. Louis-San Francisco Railway Company is substituted for the word 'Exceptor.'"

# IN UNITED STATES DISTRICT COURT

Opinion on Exceptions to Report of Special Master—Filed August 23, 1922

On Exceptions to the Reports in Favor of the Interveners of Honorable Thomas T. Fauntleroy, Special Master

W. F. Evans and E. T. Miller for the exceptors. Mr. S. H. Cowan, Mr. D. A. Murphy, Mr. John S. Leahy, and Mr. Walter H. Saunders for the interveners.

Sanborn, Circuit Judge:

Between August 16, 1906 and November 17, 1908 the St. Louis and San Francisco Railroad Company collected of certain shippers of cattle, whose claims are held by the interveners legally established freight rates, which on April 14, 1908 the Interstate Commerce Commission found to be unreasonable and unjust to the extent of about three cents per hundred pounds. That Commission then held reasonable rates to be those in force prior to 1903, and by its order made in July 1908 the earlier rates were put in force November 17, 1908. The Commission reserved all questions of reparation and, on January 12, 1914, after a new hearing on the merits, ordered the railroad company to pay in reparation of the damages for the collection of the excessive charges about \$30,000.00, interest, attorneys fees and costs. For convenience in the treatment of this controversy the amount will be hereafter stated as \$30,000.00, although that is not the exact amount.

In May 1913, on the bill of the North American Company, a general creditor of the railroad company, brought for itself and all others of its class, this court appointed receivers of all the property of the railroad company for the benefit of all its creditors as their interests might appear: the receivers took possession of all its property and proceeded to operate it and to distribute the proceeds thereof to its creditors. On April 3, 1914 the Rail Joint Company, a general creditor, filed a like bill, and that suit was consolidated with the suit of the North American Company under the title of North American Company, Com-[fol. ]200] plainant vs. St. Louis & San Francisco Railroad Company, defendant, in Equity, No. 4174, Consolidated Cause. On May 29, 1914, in this consolidated cause, this court rendered an interlocutory decree to the effect that all the property of the Railroad Company was thereby impounded, sequestered and set apart to pay the debts and obligations of the railroad company, that all parties who claimed any interest in or lien upon any of the property of the railroad company in the hands or control of the receivers should file verified statements of their claims with the Special Master on or before October 1, 1914, and that each of them who failed or refused so to do, should by such failure, be barred from receiving any share in the distribution of any of said funds of the property or of the proceeds thereof. Notice of this order and of the limitation of the time for the presentation of claims in order to permit the holders thereof to derive any benefit from or share in the

distribution of the property in the hands of the receivers or of its proceeds, was ordered to be and was duly given by a proper publication of the order itself. By subsequent orders this court extended the time for the presentation of such claims, until the necessity to know definitely the number and amount thereof as a basis for the bids of prospective purchasers at the approaching foreclosure sale who were to assume the payment of such claims, and as a basis for correct estimates of the amounts which various classes of creditors might expect to receive from the disposition of the property in the hands of the receivers, became imperative, and that time finally expired on February 1, 1916.

On May 22, 1914 the Trustees, under the general lien mortgage of the railroad company dated August 27, 1907. filed their bill for its foreclosure, on July 9, 1914 the trustee of the railroad company's refunding mortgage dated June 20, 1901 filed his bill for the foreclosure of that mortgage. The court appointed the same receivers that had been an pointed in the previous suits, who immediately took possession of and impounded all the mortgaged property for the benefit of the mortgage bond holders, and by prior orders and by an order of January 21, 1916 all the suits that have been mentioned were consolidated into the single suit entitled "North America Co., complainant vs. St. Louis & San Francisco Railroad Company, defendant, No. 4174, Consolidated Cause, final," and the final decree of foreclosure and sale was rendered in this consolidated cause and in each of its constitutent causes. Substantially all the property of the railroad company was subject to the mort-[fol. 201] gages which were thereby foreclosed.

On March 31, 1916 the final decree of foreclosure and sale of all the property of the railroad company was rendered, on July 16, 1916 all this property was sold under that decree to purchasers for the St. Louis-San Francisco Railway Company, which subsequently assumed their obligations, received the property, and will hereafter be deemed and called the purchaser. On August 29, 1916, this court, after an extended hearing upon notice to all parties in interest, confirmed this sale.

The interveners had not filed any claim to any interest in or lien upon the property or the proceeds of the property of the railroad company which had come to the hands

of the receivers, with the Master or with the court prior to the expiration of the time fixed for the filing of such claims on February 1, 1916, nor did they ever file any verified claims of that nature prior to the time when they filed their intervening petition herein on December 2, 1920. the hearing on the application for the confirmation of the sale on August 29, 1916 they gave notice to the parties to the consolidated cause that they had claims against the railroad company for illegal freight exactions that had been reduced to the judgment in the United States District Court for the Western District of Missouri of August 16, 1916, that an appeal was being taken from that judgment by the railroad company and other carriers, and that the interveners would claim that their claims evidenced by that judgment were prior in lien and superior in equity to the liens and claims of every other party whosoever upon and to the property of the railroad company in the hands of the receivers. No other or further suggestion, presentation, or action was made or taken by the interveners to present or prove their claims on or to the property sold and delivered to the purchaser, the railway company under the foreclosure decree or against the railway company until December 2, 1920 when they applied to this court for leave to file their intervening petitions in this consolidated cause. The railroad company and the railway company opposed that application.

On February 12, 1921 this court granted the application. As was stated in its memorandum, it was not then persuaded that the interveners were not entitled to present their pleadings and evidence, and it was of the opinion that the claims of the interveners would more speedily reach a [fol. 202] final and satisfactory adjudication by permitting them to plead and prove them than by refusing so to do. The court intended, by its order, permitting the filing of the intervening petitions, as the Special Master rightly ruled, thereby to permit pleadings and proofs on the merits on all the issues raised by the interveners' petitions. It did not, however, intend by that order to determine and did not determine what the Master's or the court's final adjudication should be or ought to be on any of the issues presented after the answers of the railroad company and

the railway company and the evidence of all the parties should be before them.

In the year 1903 the railroad company advanced its freight rates on shipments of cattle from the southwest to Kansas City, Chicago and other markets about three cents per hundred pounds, filed and published the schedules of the advanced rates, and otherwise complied with the requirements of the Act to regulate commerce so that these advanced rates became in 1903, and until November 17. 1908, when, by the order of the Commission based on its finding and opinion of April 14, 1908, (Cattle Raiser's Association vs. Missouri, Kansas & Texas Railway, 13 I. C.C. 418, 435) the reduced rates in existence prior to 1903 were again put in force, continued to be the legal established rates, and the only rates which the railroad company could collect or receive without violating the Act and subjecting itself to the heavy penalties prescribed for such violations. The Act to Regulate Commerce, Sections 2, 6, 10; United States Comp. Stat., Sections 8564, 8569, and 8574; Texas & Pacific Ry. Co. vs. Abelene Cotton Oil Co., 104 U. S. 436, 437. "The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving however, to the former the right to apply to the Commission for reparation." Penn. R. R. Co. vs. International Coal Co. 230 U. S. 184, 197; Robinson vs. B. & O. Rv. Co., 222 U. S. 506, 509.

The railroad company and the other carriers engaged in transporting cattle from the southwest strenuously contested the claims of the shippers that the advanced rates were unreasonable and that the shippers were entitled to the damages as reparation for the loss sustained by their collection and, after the receivers were appointed, they, under name of the railroad company, continued this contest until it was finally decided by the Supreme Court of the [fol. 203] United States. On February 10, 1904 the Cattle Raisers' Association of Texas, for the benefit of the interveners and other shippers, filed with the Interstate Commerce Commission a complaint that these advanced rates were unreasonable and unjust. The carriers denied that

they were so, and on-August 16, 1905 the Commission filed its report and opinion to the effect that the rates were unjust and unreasonable to the extent of the advances made in 1903. Cattle Raisers' Association vs. Missouri, Kansas & Texas Railway, 11 I. C. C. 296, 352, but it reserved all questions of reparation and it made no order on this report and finding so that the advanced rates still remained the legal and only freight rates which the railroad company could collect without a violation of the Act to Regulate Commerce. A report or an opinion of the Interstate Commerce Commission without an order to change established rates neither authorizes nor permits a departure therefrom

On August 29, 1906 the Cattle Raisers Association applied to the Commission to reopen this case, the Commission granted its application, set the case for a second hearing and tried it again. This trial resulted in the report and opinion of April 14, 1908 and the order of July 1908 which put the rates prior to the advances of 1903 in force on November 17, 1908, but the Commission reserved questions of reparations to be dealt with as specific claims were pre-The intervenors presented their claims for reparation to the Commission, and on January 12, 1914 it ordered the railroad company to pay to the intervenors as damages resulting from the collection of the advanced rates the \$30,000.00 it had obtained in excess of the rates prior to the advances of 1903 between August 16, 1906 and November 17, 1908. On December 29, 1914 the intervenors brought an action at law in the United States District Court for the Western District of Missouri upon the Commission's award of damages and orders of reparation, and on August 16, 1916 they recovered judgments against the railroad company for the \$30,000, interest and attorneys' fees. One of these judgments was subsequently reversed by the Court of Appeals but was finally affirmed by the Supreme Court on May 27, 1920, and by stipulation of the parties the other judgment thereafter stood firm.

In May 1913 this court appointed receivers of and took into its exclusive possession and control, all the property of the railroad company for the purpose of administ-ring, selling and distributing it and its proceeds to the creditors [fol. 204] and stockholders of the company in accordance with the respective ranks and equities of their claims upon

and to it. It is indispensable to the just administration and distribution of such property that the court shall be advised and know, as far as possible, before it proceeds to adjudicate the equities of the parties interested in it or to sell it or distribute its proceeds, the claimants who seek to participate in it and the nature and extent of their claims. Such knowledge is necessary to enable the court to reach a basis for action in determining the equities of claims, the propriety of sales, the probable value of various claims, and the propriety of settlements and compromises thereof. In order to secure this information it has long been the lawful and approved practice of courts of equity and probate engaged in the administration and distribution of such property to render interlocutory decrees or orders to the effect that all who desire or intend to seek to participate in such property or the benefits therefrom, shall file their verified statements of the amounts and natures of their claims on, in, or to the property or its proceeds, by certain times, and that all who fail to file such claims before the expiration of such times, shall be thereby barred and forcelosed from any lien upon or interest in the property in the hands of the court or its proceeds. Such orders are primarily and chiefly for the assistance and benefit of the court in the discharge of its duties of administration and distribution, although they are also beneficial to claimants and especially to those who desire to bid for the purchase of the property. And, as the latter are frequently required to pay some or all of such claims as a part of the purchase price of the property, they are warranted in relying upon the statements thus filed and the interlocutory and final decrees of the courts barring those claimants from participation who do not present such verified statements within the times fixed. Such an interlocutory decree was rendered in this suit, which, by its express terms, foreclosed and barred the intervenors in this ease from all liens upon and interests in the property of the railroad company or its proceeds because they had failed to file any verified statements of claims thereon or thereto on or before February 1, 1916. Such decrees and orders are lawful, customary and effective. Farmers Loan & Trust Company vs. Chicago & N. P. R. Co., 118 Fed. 204. 205; Western New York & P. R. Co, vs. Penn Refining Company, 137 Fed. 343, 367.

The actions at law which the intervenors were proseenting against the railroad company in the United States District Court at Kansas City and in the Supreme Court [fol. 205] gave no notice to this court and it had no knowledge whether or not the intervenors claimed any lien upon or interest in the property of that company in its possession, except that information which it derived from the fact that they had not filed such verified claims, although their claims against the railroad company had been established as to the liability of the railroad company and as to their amounts by the reparation orders of the Interstate Commerce Commission of January 12, 1914 and the intervenors could have filed their verified claims for participation in the benefits of the property in the hands of this court at any time after January 12, 1914 and before February 1, 1916. Not only this, but this court had plenary jurisdiction, upon proper application, to have heard and decided their claims for participation in the benefits of this property whether those claims were founded on causes of action at law or in equity.

They filed no claims, and on March 31, 1914 the final decree herein expressly adjudged the claims of all who had neither interviewed nor filed verified claims, foreclosed and barred of participation in the benefits of the property or its proceeds as against all parties claiming under that decree. On July 16, 1916, in reliance upon these decrees, the railway company purchased all the property at the foreclosure sale. Then and thereby the court contracted to convey that property to the purchaser for the purchase price it bid for that property, free from the claims of the intervenors, as it had decreed that it was, and the purchaser contracted to pay the purchase price it bid therefor. The court and the purchaser performed this contract. On August 29, 1916 the court confirmed the sale. A few days later it caused the property to be conveyed to the purchaser. The purchaser paid the price it had bid for it, issued its stock and bonds to the amount of hundreds of thousands of dollars, and immediately placed them upon the market so that many of them must have gone into the hands of innocent purchasers long before the intervenors on December 2, 1920 applied for leave to file their intervening petitions. What then do the intervenors now claim and seek? After failing to file their verified claims as ordered by the interlocutory decree from May 29, 1914 until after the time so to do expired on February 1, 1916, after neglecting to make any motion, file any petition or application to this court, or to take any other effectual step to question or avoid the decrees of the court, or the sale and disposition of the property under them, or the effect of their long delay and inaction until they anplied to file their intervening petitions, more than six years [fol. 206] and eight months after the liability of the railroad company to them and the amounts of their claims had been fixed and directed by the reparation orders of the Commission to be paid by the railroad company, and more than four years after the contract of the court to sell the property was made on July 16, 1916, the sale confirmed. the property delivered to the purchaser, the property paid for by the purchaser, the stocks and bonds of the purchaser issued and many of them doubtless sold to innocent purchasers, the intervenors' appeal to this court of equity to disregard its contract of sale, its interlocutory and final decrees and compel the purchaser to pay for the property it bought in reliance upon the silence and inaction of the intervenors and the adjudications of those decrees \$30,000, interest thereon for many years and attorneys' fees in addition to the amount for which the court by its decrees and contract of sale agreed to sell and convey and did sell and convey this property to the St. Louis-San Francisco Railway Company. But "Where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice or that the intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable power in order to save one from the consequences of his own neglect." Penn Mutual Life Insurance Company vs. Austin, 168 U.S. 698, 699. Since the intervenors neglected to file their verified claims and those claims became barred by the interlocutory decree and the final decree, the rights of the purchaser under its contract of purchase and deed and the rights of each of its stockholders and creditors have intervened in just reliance upon that neglect and the decrees of the court and the granting of the relief which the intervenors now see will impair those rights to the amount in the aggregate of this \$30,000.00, interest and attorneys' fees.

The statute of limitations of the State of Missouri, applicable to the cause of action at law analogous to that which the intervenors here present is five years from the date of 1 Rev. Statutes of Missouri, 1909, Sections 1887, 1889. The limitation on the analogous action at law prescribed by the Act to regulate commerce is two years, 8 U. S. Comp. Stat., Section 8584. The cause of action which the intervenors are now most seriously urging is based upon the propositions that the money collected from the excessive rates prior to November 17, 1908 were unlawfully exacted from them by the railroad company, that the railroad company consequently became a trustee ex maleficio of those moneys, that the railroad company until [fol. 207] the receivers were appointed in May 1913 and the receivers thereafter always had sufficient moneys to pay back the moneys the railroad company thus exacted, and that the purchaser at the foreclosure sale took the property he bought subject to the trust ex maleficio subject to which the railroad company took the moneys collected in 1908. If this theory is maintainable the cause of action based upon it accrued when the railroad company collected the moneys prior to November 17, 1908. 39 Cyc. 176: Wheeler vs. Reynolds, 66 N. Y. 227, 235; Grove vs. Kase. 45 Atl. (Pa.) 1054. And neither that theory nor any claim or suggestion of it, so far as the court can discover, was ever made by the intervenors in or out of the proceedings in this court, or in any other court, until December 2, 1920 when the intervening petitions were presented—more than twelve years after the cause of action to enforce this alleged trust accrued-more than six years and nine months after the Commission's orders of reparation had liquidated and fixed the amounts of the intervenors' claims, the liability of the railroad company for them and had directed that company to pay them.

In the application of the doctrine of lackes the settled rule is that courts of equity ordinarily act or refuse to act in analogy to the statute of limitations relating to actions at law of like character. Generally a suit or an application for relief in a court of equity will not be stayed for lackes before the expiration of the time, and will be stayed after the

expiration of the time fixed by the analogous statute of limitations at law. When such a suit or application is brought within the time of the analogous statute of limitations the burden is upon the defendant to show that it would be inequitable to permit it to be maintained on account of unusual circumstances, such as innocent purchasers to be affected and radical changes in the relations and interests of the parties meanwhile. On the other hand if such a suit or application is brought after the time fixed by the analogous statute of limitations at law the burden is upon the complainant or petitioner to plead and prove unusual conditions or extraordinary circumstances which make it inequitable to apply the settled rule and stay the proceeding notwithstanding the fact that the analogous limitation expired before this suit or application was brought. case falls in the latter class. The times of the statutory limitations of the analogous actions at law had all expired long before the petitions presented their applications for intervention and their petitions ought to be dismissed under the settled rule unless by pleading and proof they have established preponderant equitable reasons why they should [fol. 208] be exempted from its operation. Kelly vs. Boettcher, 85 Fed. 55, 62: Ide vs. Trorlicht Dunker & Renard Carpet Co., 115 Fed. 137, 149.

They urge that from 1904 until April 1914 they were prosecuting their claims before the Interstate Commerce Commission and thereafter before the United States District Court at Kansas City and the Supreme Court until December 1920, and that the railroad company and the receivers were defending against these claims. But all those proceedings were against the railroad company for personal judgment against it for damages. The Commission and the courts in which those proceedings were taken had no jurisdiction of the administration and distribution of the property of the railroad company of which this court had exclusive control after May 1913. This court also had jurisdiction on proper applications by the intervenors, certainly after the orders of reparation of April 1914 were made fixing the amounts of their claims and the liability of the railroad company and perhaps before that time, to receive, hear and allow or disallow their claims upon or to the property or the proceeds of it in its possession

whether those claims were based on causes of action at law

or in equity.

They say that the delay of Boyd in Northern Pacific Railway vs. Boyd, 228 U. S. 480, 507, was much longer than their delay in the case at bar, but in that case it was indispensable to the maintenance of Boyd's suit in equity that he should first secure a judgment in his action at law. Here no judgment was necessary. All that the interlocutory decree required of the intervenors was to file verified statements of their claims, not to prove them, before February 1, 1916. The pending proceedings at law in other courts against the railroad company presented neither impediment to their compliance with that decree nor excuse for their failure so to do.

They insist and it is conceded that they had no actual notice or knowledge of the interlocutory decree and its limitation of the time to file claims until August 29, 1916the day of the confirmation of the sale. But in cases of the administration and distribution of property in the exclusive possession and control of courts of equity and probate courts, reasonable publication of their orders limiting the times to file claims and barring the claims of those who do not file within the times fixed to participate in the benefits of such property or its proceeds, constitutes regular and binding notice thereof, and further notice or knowledge is [fol. 209] is not dispensable to bar the claims: Again "If a person be ignorant of his interest in a certain transaction, no neglect is imputable to him for failing to inform himself of his rights, but if he is aware of his interest and knows that proceedings are pending, the result of which may be prejudicial to such interests, he is bound to look into such proceedings so far as to see that no action is taken to his detriment." Foster vs. Mansfield Coldwater & Lake Mich. R. R. Co. 146 U. S. 88,100. The counsel for intervenors knew soon after May 1913 that all the property of the railroad company had been dedivered to the possession and control of this court for administration and distribution and that the railroad company had none of it. They knew that in cases of this character the common, lawful and effective practice of courts of equity was to make and publish by advertisement in the newspapers decrees or orders limiting the times to present claims to such courts to participate in the benefits of the administration and distribution of the property and by such orders or decrees to bar from participation therein the claims of all those who failed to file statements of them within the time fixed. amination of the record of this court at any time between May 29, 1914 and February 1, 1916 the intervenors or their counsel could have learned of the interlocutory decree Notice of facts and circumstances which and its effect. would put a man of ordinary prudence and intelligence on inquiry is, in law and in equity, notice of all the facts a reasonably intelligent inquiry would disclose. Wood vs. Carpenter, 101 U.S. 135, 137, 141. The intervenors' notice of the exclusive possession and control by this court by its receivers of all the property of their debtor for the purpose of administration and distribution was sufficient to put a claimant of ordinary prudence on inquiry as to the course requisite for him to pursue to share therein, and such an inquiry would have disclosed, as it did disclose to hundreds of other claimants, the limitation and bar of the interlocutory decree. If the intervenors failed to exercise like prudence and diligence that fact does not appeal with sufficient force to induce a court of equity to relieve them of the injurious effect of that neglect by imposing it upon the diligent claimants who complied with the decree of the court and their successors in interest.

Intervenors invoke the fact that on August 29, 1916, the day of the confirmation of the sale, after the interlocutory decree, after the final decree and after the contract of sale [fol. 210] had been made, they gave notice to the parties to this suit and to the purchaser that they claimed and intended to enforce their claim that they had liens upon the property sold to the purchaser prior in right and superior in equity to those of any and all parties whomsoever. It may be that if they had then filed a dependent bill or, as was done in the Boyd case, an original bill, Northern Pacific Rv. vs. Bovd, 228 U. S. 482, 492, or if they had then procured an insertion in the final decree of such an exemption of themselves and their claims from the estoppels thereof as the Guardian Trust Company secured in Central Improvement Co. vs. Cambria Steel Company, 201 Fed. 811, 815: Kansas City Southern Ry. vs. Guardian Trust Company 240 U. S. 166, 174 they might possibly have escaped those estoppels and the fatal consequences of their laches. But they made no motion or application and took no action to secure any relief from those decrees or to stay the continuance of their negligence until December 2, 1920-more than four years thereafter. If the owner of an over-due promissory note notifies its maker that he has a right of action and that he will enforce that right against that maker to the payment by him of that note such a notice will not stay the running of the statutes of limitations against such an action to secure such a result. An actual commencement of the action is indispensable and the intervenors' notice of August 29, 1916 that they claimed and would enforce rights to liens upon or interests in the property prior in right and superior in equity to those of all others whomsoever was equally futile to destroy, stay, or exclude the estoppel effected by their laches. "The mere assertion of a claim unaccompanied with any act to give effect to the asserted right could not avail to keep alive a right which would otherwise be precluded because of laches." Mackall vs. Casilear, 137 U. S. 556, 567; Penn Mutual Life Ins. Co. vs. Austin, 168 U. S. 687, 697.

They say that a court of equity has the power to permit the filing of claims in a receivership suit after the time fixed by the interlocutory decree or order has expired, and in Park vs. New York L. E. & W. Ry. Co., 140 Fed. 799, and In Re Ziegler, 190 N. Y. Supplement, 683, in which sufficient parts of trust funds remained in the hands of the courts to pay certain cestuis que trust the shares to which they were entitled and no injury would result from such payments to others, the courts, upon good excuses, one of which was infancy, the courts allowed them to come in after the times and obtain their shares. But this is no such case. There are and were no trust funds from this property in [fol. 211] the hands of this court to pay the intervenors' claims on December 2, 1920. The funds secured from the sale had been distributed, the property they seek to charge had been sold and conveyed to the purchaser by the court, the purchaser had paid for it. Its stocks and bonds had gone upon the market under two decrees which barred the intervenors' claims more than four years before the intervenors applied for leave to assail them, and they present no reasonable excuse for these delays.

It is claimed and conceded that the final decree in Article 10, Paragraph b required the Receiver in not more than twenty nor less than ten days prior to the day of sale, July 16, 1916, to file a statement of all unpaid indebtedness and liabilities of the railroad company incurred prior to the anpointment of the receivers "and which, so far as they are informed, are claimed to be prior in lien or superior in equity to the refunding mortgage" and the receivers did not include the claims of the intervenors in the list they filed. But prior to that time the intervenors had failed to file their claims by February 1, 1916 and those claims had been adjudged by the interlocutory decree and by the final decree of March 31, 1916 to be finally barred so that it was not the duty of the receivers to list them, and their failure so to do was the natural and direct effect of the negligence of the intervenors.

Another alleged excuse for their laches is that the general creditors of the railroad company received offers of settlement pursuant to the terms of the final decree before the confirmation of the sale, and no such offers were made to the intervenors. But if they had filed their verified list of their claims pursuant to the terms of the interlocutory decree they would have received such offers. Their failure to receive them was the natural and direct effect of their failure to comply with the terms of the interlocutory decree and was but another evidence of their lack of diligence.

Counsel for the intervenors claim and the special master found that the final decree contemplated that such claims as theirs might be filed and presented to this court after the entry of the decree. The provisions of the decree which condition the correctness of this contention are Article ninth b. that the purchaser at the sale shall pay "any unpaid claims of creditors of the defendant railroad company which have been or shall be admitted by the parties in interest or adjudged by this court to be prior in lien or superior in equity to the refunding mortgage or the general [fol. 212] lien mortgage," Article Tenth, That the Receivers shall, before the sale, file a statement of (b.) "All paid claims of creditors of the defendant railroad com-

pany that they are informed are claimed to be prior in lien or superior in equity to the refunding mortgage \* \* \*. All claims and demands against the defendant railroad company which have been filed in this court pursuant to the orders heretofore entered herein save such as shall have been paid in [fill] \* \* \*. Notice having been given for the presentation in this cause of claims and demands against the defendant railroad company of every character and description, whatsoever, and the time for the presentation of said claims having expired, (no claim or demand which has not been presented in this cause in accordance with the orders heretofore made requiring presentation thereof other than (1) \* \* \* (2) Any claim that may arise after the entry of this decree, shall be enforced against the receivers or against the property sold or any part or portion thereof or against any purchaser of the same or any part thereof, his successors or assigns." The view of the Special Master was that the word arise in the exception "other than any claim that may arise after the entry of this decree" did not mean accrue and that while the claims of the intervenors did not accrue after the entry of the decree, they arose thereafter, and hence were excepted from what seems to the court to be the plain and comprehensive bar of all claims not presented as required by the interlocutory decree, contained in that decree and in the final decree. But after thoughtful consideration the court is unable to adopt this view or to resist the conclusion that the meaning of the word arise in the connection in which it is here used was identical with the meaning of the word accrue, that none of the claims of the intervenors either arose or accrued after the entry of the decree, and that they all fall under the ban of both decrees.

Another contention of the intervenors which the special master adopted was that the foreclosure decree, the sale thereunder, and the confirmation were, between the interveners on the one hand the purchaser and those claiming under it on the other, "without form and void" and that the interveners could in this proceeding avoid or disregard them and subject the property sold to the purchaser to the payment of their claims under the rule in Northern Pacific Railway Company vs. Boyd, 228 U. S. 483. But the reorgan-

ized corporation which purchased the property in this case. its rights to the property, the final decree itself, the sale and confirmation thereof thereunder, and the estoppels effected [fol. 213] thereby, are free from the vice that rendered the decree and sale in Boyd's case voidable or void as to him. That vice was that the real purchaser at the sale was the reorganized corporation in which the stockholders of the mortgagor were given beneficial interests for their stock while the unsecured creditors were excluded from any such In the course of the foreclosure proceedings in this case, which resulted in vesting the title to the property in the purchaser at the foreclosure sale a fair and reasonable offer of cash or a beneficial interest in the purchaser corporation, was offered to every creditor who filed the verified statement of his claim as required by the interlocutory decree, and more than 90% of the unsecured creditors accepted that offer. The validity and conclusiveness of that final decree against those who refused to accept the offer or disregarded it has been repeatedly adjudged by this court. Its opinion in the case of McElvain, who filed his verified claim and then failed to accept the offer, St. Louis-San Francisco Ry. Co. vs. McElvain, 253 Fed. 123, 129, 130, 133, 135, discloses the reasons for those adjudications. If the interveners had filed verified lists of their claims as directed by the interlocutory decree they would have undoubtedly have received fair offers of beneficial interests in the purchasing corporation or of cash. They failed to file such lists as required by the decree of the court and are consequently in a much less favorable position to assail, avoid or disregard the estoppel of the decree and of the sale that was Me-Elvain, and for the reasons stated in this case they are, in the opinion of the court, subject to those estoppels.

There is another reason, not less persuasive, why they are stopped from disregarding, avoiding or assailing the validity of the decrees or the sale in this case. They are here on an order of this court made at their request, which permits them to intervene in this case, more than four years after these decrees, and that sale were made. They do not come here on an original bill as did Boyd or under an express exemption of themselves and their claims from the estoppels of the decree inserted in the body thereof before

it was made as did the Guaranty Trust Company. voluntarily intervened in this case more than four years after the decree and the sale, and after during those four years, many innocent purchasers must have become financially interested in the stock and bonds of the purchaser. and all the relations of the interested parties have radically changed in reliance upon the validity of the decree and the sale. It is the established and general rule that those who [fol. 214] intervene in a suit in equity on their own applications enter subject to and are thenceforth bound and estoppel by all the previous orders, decrees and acts of the court in the suit to the same extent as they would have been if they had been parties to the suit when those orders. decrees and acts were respectively made, and, under this rule the interveners are conclusively estopped from avoiding, disregarding or assailing the decrees, the sale, the estoppels thereof, or the title to the property in the purchaser. Swift & Co. vs. Black Panther Oil Gas Co., 224 Fed. 20, 29.

All the other findings and conclusions of the master and all the contentions of the intervenors concerning this question of laches and estopped have been carefully considered, but they have only confirmed the conclusion which those which have been discussed and the facts which have been recited, have converged with the compelling power to force

upon the court.

Under the general rule that the doctrine of laches is applied in accordance with the statutory limitation of the analogous action at law the interveners were estopped by their laches to maintain this intervention. The liability of the railroad Company for and the amounts of their claims were adjudicated and fixed by the orders of reparation of the Interstate Commerce Commission in April, 1914. The interveners could have presented their claims at any time from April, 1914, until February 1, 1916, to this court which had plenary and exclusive jurisdiction to hear and adjudge their claims of rights to participate in the benefits of the property in its possession. They were ordered and decreed by the interlocutory decree to present those claims to the court by February 1, 1916, or to be barred from enforcing them against that property or its proceeds. They were estopped from enforcing those claims by means of

this intervention because they failed to obey the decree of the court to file with it verified statements of their claims by February 1, 1916, because they never filed with or presented them to this court until December 2, 1920, when they filed this petition to intervene—more than six years after every impediment to their presentation of them to this court had been removed by the reparation orders of 1914, and hecause, meanwhile, in reliance upon their failure to file their claim to participate in the benefits of the property, this court had rendered its final decree barring their claims. had made the foreclosure sale, had contracted to sell and [fol. 215] convey the property free from their claims, and the purchaser had contracted to buy it free from their claims, the sale had been confirmed, the court had caused the property to be conveyed to the purchaser, that purchaser had paid for it, had issued its stock and bonds, they had put upon the market, all relations and rights of those intersted in the property had radically changed and the proceeds of the sale of the property had been distributed to those entitled to it, and finally, because no justification or reasonable excuse for this misleading silence and inaction has been established.

The result of the whole matter is that the court is unable to resist the conclusion that the equity of the purchaser, the St. Louis-San Francisco Railway Company, is superior to the equities of the interveners here, that it would be contrary to the familiar and established rules of equity jurisprudence and would be inequitable after the negligence and long delays of the interveners to permit them to maintain their claims and obtain decrees imposing the losses they may suffer from their own neglect and inaction upon the purchaser and the holders of its stock and bonds who have not failed in diligence in addition to the purchase price for which the court contracted to sell and did sell and convey the property to the St. Louis-San Francisco Railway Company. For these reasons the intervening petition must be dismissed.

The Court has not failed to note nor to consider the facts that in the actions at law against the railroad company for damages resulting from the collection of excessive charges brought in the United States District Court at Kansas City that court allowed to the interveners by its judgments

against the railroad company on August 16, 1916, certain amounts as attorneys' fees for the interveners, that they pleaded these facts in their intervening petitions of December 2, 1920, and asked to recover these attorney's fees of the purchaser, the St. Louis-San Francisco Railway Company, on the ground that the receivers in this suit, who were not parties to those actions at law, through their attorneys defended them but the attorneys' fees were allowed by those judgments and arose before the confirmation of the foreclosure sale, more than four years before the interveners filed in this court any petitions or any claim for them. The equities of those claims are inferior to those of the rights of the railway company under the foreclosure decree and sale for the same reasons that the claims that have already been considered are and for the further rea-[fol. 216] son that the fact that the receivers deemed it their duty to and did defend those actions at law against the railroad company to which they were not parties did not impose upon them in these cases, much less upon the purchaser under the foreclosure sale, any liability at law or in equity to pay the attorneys' fees which the court of Kansas City adjudged a liability of the railroad company only. For like reasons the claims of the interveners by supplemental petitions filed after December 2, 1920, for decrees against the railroad company for the payment by it of attorneys' fees allowed to the interveners against the railroad company by the court at Kansas City subsequent to December, 1920, cannot be sustained and the supplemental petitions in intervention as well as the original petitions must be dismissed.

Nor has the court failed to consider whether or not the interveners would be entitled to a recovery from the railway company if they had not been heard from any such relief by their laches.

They insist that they are entitled to decree against the railway company because (1) The Railway Company collected and received the excessive charges unlawfully and thereby became a trustee ex maleficio thereof for the benefit of the interveners, that they have traced the trust moneys thus collected from the railroad company to the receivers, and from the receivers into the property bought by the railway company at the foreclosure sale, and (2), because their

claims against the property of the railroad company on account of these collections were prior in right and superior in equity to the claims on or to that property of all prior mortgages and lienholders and of all other parties whomsoever under the rule which permits a court of equity which has seized by its receivers and impounded the property and income of a railroad company for the benefit of mortgage bondholders and other like lien holders to prefer to their claims in equity and in payment that small class of unpaid claims which arise from the current expenses of the ordinary operation of the railroad for wages, supplies, materials and such necessities of operation during six months immediately before the income is thus impounded.

But if the railroad company ever became a trustee ex maleficio of the moneys it collected from these excessive charges it became such day by day as it collected them between January 29, 1906, and November 17, 1908. The in-[fol. 217] terveners' causes of action to enforce that trust accrued prior to the latter date, and, if there was such a trust every impediment to the prosecution of a suit or proceeding to enforce it, either in this suit or elsewhere, if there ever was any impediment, was removed on January 12. 1914, when the Commission made its orders of reparation. The interveners never commenced any proceeding to enforce such a trust, never pressed or suggested such a trust until they presented their intervening petitions herein on December 2, 1920, and, as has already been held, they were estopped by this delay from enforcing it against the railway company.

During the time when the collections of these excessive charges were made these charges were parts of the freight rates duly established, scheduled, filed, published, and in force in strict compliance with the requirements of the Act to Regulate Commerce. They were during this time the legal established rates and the only rates which the railroad company could collect without a violation of the Act to Regulate Commerce. The issue whether or not they were unreasonable or unjust was pending and in process of hearing and decision, but not yet decided before the Interstate Commerce Commission. Section 1 of the Act to Regulate Commerce, U. S. Comp. Stats. Section 8563 prohibited any unjust and unreasonable charge. Section 6 (7) U. S. Com-

piled Stat. Section 8569 prohibited the railroad company from collecting or receiving a greater or less or different compensation for the transportation here involved than that specified in the established schedules, and Section 10 of the Act, U. S. Comp. Stat., Section 8574 imposes a penalty for a violation of this provision, and the Supreme Court held that "If, as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation. Penn R. R. Co. vs. International Coal Company, 230 U. S. 184, 197; Texas & Pacific Railroad Company vs. Abilene Cotton Oil Co., 204 U. S. 426, 437. The railroad company collected these legally established rates. It had the decision and direction of the highest judicia; tribunal in the land for its instification, and this court is of the opinion that its collection of these rates was not unlawful. The prohibition of Section 1 and that of Section 6 must be read and interpreted together, and the correct construction of them is that the specific prohibition of Section 6 constitutes an exception from the general prohibition of Section 1. A construction that each prohibition is of equal force and equally [fol. 218] applicable in such a case as that in hand would impose upon the carrier the penalty of a violation of Section 1 if it complied with Section 6, and the penalty of violation of Section 6 if it complied with Section 1, and an interpretation which leads to such an absurdity ought to be Potter's Dwarris on Statute & Constitution, 128 rejected. Rule 15.

The Act of Congress imposed upon the railroad company the duty to establish freight rates and publish schedules of them as prescribed by that Act and made the rates so established by it the legal rates. The railroad company so established the rates. It was its duty to its stockholders and creditors to establish compensatory rates and to the shippers to establish reasonable rates. The legal presumption is that it intended and endeavored to establish rates that were both compensatory and reasonable. A trustee exmaleficie of moneys or property is one who has acquired it by a violation of some provision of the moral or legal code. Frand, misrepresentation, deceit, violation of some law or

some other like act or representation, something that taints the conscience, is indispensable to the raising of such a trust or the making of one such a trustee. Mr. Pomeroy says "An exhaustive analysis would show, I think, that all instances of constructive trust properly so called may be referred to what equity denominates fraud, either actual or constructive, as an essential element, and as their final source." Pomeroy's Equity Jurisprudence, Section 1044. Because the collection of these excessive charges was not unlawful, because the railroad company by their collection was guilty of no fraud, misrepresentation, deceit or violation of the moral or legal code it did not take these collections as a trustee ex maleficio, no trust arose, and no cause of action to enforce such a trust ever accrued here.

Moreover, this alleged cause of action to charge the railroad company as a trustee ex maleficio of the moneys collected by it from the excessive charges is not maintainable (1) because it is not consistent with and is abrogated by the Act to Regulate Commerce and by the exclusive remedies for such collections by reparation prescribed by that Act, and (2) because the interveners are estopped from maintaining it by their prosecution of their inconsistent remedy by reparation under the Act of Congress from 1906 until December 1920, Act to Regulate Commerce, Sections 8, 16: U. S. Compiled Statutes, Sections 8572, 8574. The theory and indispensable basis of the alleged trust is that the [fol. 219] ownership of the moneys collected by the Company from the excessive charges never passed from the interveners to the collector but that the latter took and its successors in interest still hold those moneys in trust for the owners, the interveners. The theory and the indispensable basis for the remedy by reparation provided by the Act to Regulate Commerce is that the interveners lost the title and ownership of the moneys collected by the company, were damaged by that loss, and that those damages are to be paid by the reparation provided by the Act to Regulate Commerce, Sections 8 and 16; Sections 8572, 8574 Supra. In Texas & Pacific Railway Company vs. Abilene Cotton Oil Co. 204 U. S. 426, the Supreme Court in effect held that the remedy by reparation prescribed by the Act to Regulate Commerce for the collection of excessive charges. were, as in this case, a decision of the Interstate Commerce Commission was essential to determine the unreasonableness and the extent of the unreasonableness of the rates, was exclusive and that no action at common law could be maintained on account thereof. That Act is no less prohibitory of a remedy by a proceeding or suit in equity to charge the collector of the excessive charges as a trustee ex maleficio thereof. Every reason given by the Supreme Court why the Act practically abrogates actions at law on account of the collections of such excessive rates applies with equal force to the suit or proceeding to enforce such a trust together with the further and not less conclusive reason that the basis of such a suit or proceeding is not only inconsistent with but diametrically opposed to the basis and theory of the remedy by the reparation for damages

prescribed by the Act of Congress.

The remaining question is—are the claims of these interveners members of that small class of unpaid claims the considerations of which were parts of the current expenses of the ordinary operation of the railroad for wages, supplies, materials and like necessities of operation during the six months immediately preceding the impounding of the income by this court in 1914 for the benefit of the holders of bonds secured by prior recorded mortgages. To support an affirmative answer to this question and their trust theory counsel cite and seem to rely with confidence on the decision of the court of appeals of this circuit in Love vs. North American Company, 229 Fed. 103. The opinion in that case has been thoughtfully studied and considered before reaching any of the conclusions on these subjects in the case in hand. But the decision of that case was not conditioned [fol, 220] by the provisions of the Act to Regulate Commerce or by proceedings thereunder; the excessive charges in that case were collected within approximately six months preceding the receivership and the material facts of that case were, in the opinion of the court, so radically different from those in the case under consideration that the decision and opinion therein are inapplicable to them.

It is indispensible to that equity which permits a court of chancery to decree the claim of an unsecured creditor to the property of a railroad company or its proceeds prior in right, superior in equity, or preferred in payment to the claims of bondholders secured by prior recorded mortgages or liens, (1) that the consideration of such a claim was a part of the current expenses of the ordinary operation of the property of the mortgagor incurred in the usual course of its business for labor, supplies, or other like necessities of operation. Illinois Trust & Savings Bank vs. Dowd. 105 Fed. 123, 124 141, 149; Southern Railroad Company vs. Carneigie Steel Co., 176 U. S. 257, 259, 296; Lackawana Iron & Coal Co. vs. Farmers Loan & Trust Co., 176 U.S. 298, 315; Chicago & A. Ry. Co. vs. United States & Mexico Trust Co., 225 Fed. 940, 943; Rogers Ballast Car Co. vs. Omaha, Kansas City & E. R. Co. et al, 154 Fed. 629, and (2) that the consideration was paid and the liability of the mortgagor company on account thereof was incurred within six months immediately preceding the impounding of the property by the court for the benefit of the bondholders. Southern Railway Company vs. Carnegie Steel Co., 176 U. S. 292; Westinghouse Air Brake Co. vs. Kansas City Southern Ry. Co., 137 Fed. 26, 40; Blair vs. St. Louis, H. & K. R. Co., 22 Fed. 471, 474; Crane vs. Fidelity Trust Company. 238 Fed. 693, 696, 697.

The reason for the allowance of the preferential payment of claims for wages, supplies, and like necessities of the ordinary operation of the railroad during six months immediately preceding the impounding of its property and income is that the holders of such claims may rely for the payment thereof, not upon the personal liability of the railroad, but upon the expected income from the operation of the railroad company for the succeeding six months, and upon the practice of courts of equity, upon impounding the property and its income to give such claims preference in payment over the payment of claims secured by prior recorded liens. But the claims of these interveners are not claims for wages, supplies or any such like necessities of the ordinary opera-[fol. 221] tion of the railroad. They are not for a part of the expenses of the railroad. They are for a part of its income. They are for the collections from the interveners of excessive charges. Such collections were not a part of the usual or necessary expenses of the operation of the rail-Railroad Companies do not ordinarily and usually in their operation collect excessive charges. a part of the unusual and, the Commission afterwards held, of the unnecessary income of the mortgagor. Nor did the interveners pay them in reliance upon the expected income of the railroad company for the six months succeeding the respective times of their payments in 1907 and 1908, but their reliance was upon the personal reliability of the railroad company. So it is that these claims fall neither within the class of preferential claims nor within the reasons for the existence of that class.

Nor were the payments of these charges made nor did the railway company incur its liability on account of their collection within six months or approximately within six months immediately preceding the impounding of the property and income of the railroad company for the benefit of the bondholders in 1914. On the other hand these payments were made and the liability of the railroad on account of them was incurred more than five years before that im-While it is true that there are courts which pounding. have sometimes allowed preferences in payments to claims that have accrued more than six months before the impounding, the established rule of the Supreme Court and of the courts of this circuit limits the allowance of such claims to those incurred within the six months of approximately within that time.

The enforcement of a rule limiting the allowance of preferential claims of this character to those incurred within that time is both reasonable and necessary to the protection of claims secured by prior recorded mortgages and liens. Preferential claims of this class are not of recordare generally incurred without notice to or the knowledge of the holders of prior recorded liens. If, during longer periods than six months, if, during many more months or during years, the mortgagor and its unsecured creditors may continue to create such preferential liens, they can thus pile up large debts of the mortgagor secured by secret liens paramount to the liens of the mortgages and of other recorded liens upon the property of the mortgagor; by paying the interest or causing it to be paid, on the bonds secured by the prior liens meanwhile they can deprive the [fol. 222] bondholders of the possession and application of the property to their claims until their security is destroyed or so impaired that their wiser course may be to abandon the property to the holders of such secret preferential

claims. It was to prevent such results that this limitation was established, and it is a just and equitable one. Westinghouse Air Brake Co. vs. Kansas City & Southern Ry. Co., 137 Fed. 26, 40 and cases there cited.

The reason that six months immediately preceding the impounding for the benefit of the secured liens has been generally fixed as the time within which such preferential claims may arise, is because usually a six months' interval passes between the dates when installments of interest on bonds fall due and because mortgages provide, and when they do not parties in interest assume, that when an installment of interest is paid, current expenses to that time have either been paid or funds to pay them have been provided. Crane vs. Fidelity Trust Company, 238 Fed. 693, 696.

For the reasons which have now been stated the court finds itself unable to resist the conclusion that if the prosecution of the proceedings commenced by the intervening petitions herein had not been barred by laches the claims of the interveners to liens upon or interests in the property of the proceeds of the property of the mortgagor company prior in lien or right, or superior in equity to the prior recorded liens of the mortgages foreclosed could not be sus-

tained.

Let the intervening petitions and supplemental petitions be dismissed without costs to either party.

# IN UNITED STATES DISTRICT COURT

## [Title omitted]

Order Dismissing Petitions of Intervention—Filed August 23, 1922

[fol. 223] On Exceptions to the Report in Favor of the Interveners of Honorable Thomas T. Fauntleroy, Special Master

Mr. W. F. Evans and Mr. E. T. Miller for exceptors. Mr. S. H. Cowan, Mr. D. F. Murphy, Mr. John S. Leahy, and Mr. Walter H. Saunders for the interveners.

Upon consideration of the exceptions to the Report of Hon. Thomas T. Fauntleroy, Special Master, the pleadings and evidence before the Master, the briefs and arguments of counsel:

It is hereby ordered and adjudged that the exceptions to those parts of the report of the Special Master which are contrary to or inconsistent with the views of the Court expressed in the memorandum opinion filed herewith, be and they are hereby sustained, and that the Intervening Petition and the Supplemental Petitions of the Interveners, be and they are hereby dismissed without costs to either party.

Dated this 19th day of August A. D. 1922.

Approved:

(Signed) Walter H. Sanborn, Senior Circuit Judge.

### IN UNITED STATES DISTRICT COURT

Petition for Appeal—Filed February 17, 1923

The above named interveners, E. B. Spiller and E. B. Spiller, et al., conceiving themselves aggrieved by the order entered on August 23, 1922, in the above entitled proceeding, do hereby appeal from said order to the United States Circuit Court of Appeals, Eighth Circuit, and they pray that this, their appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals, Eighth Circuit.

S. H. Cowan, John S. Leahy, David A. Murphy, Walter H. Saunders, Attorneys for Interveners.

# [fol. 224] IN UNITED STATES DISTRICT COURT

Assignments of Error-Filed February 17, 1923

Now come E. B. Spiller and E. B. Spiller et al., interveners in the above entitled cause, and file the following assignments of error upon which they will rely in their appeal from the order made by this Honorable Court on the 23rd day of August, 1923, dismissing the intervening peti-

tions and the supplemental intervening petitions of both E. B. Spiller and E. B. Spiller et al., interveners herein, disallowing the claims of said interveners and denying the claims of said interveners to priority in the payment of their claims again-said defendant and said St. Louis-San Francisco Railway Company.

I

That the Court, in an opinion and order by Hon. Walter H. Sanborn, Circuit Judge, erred in sustaining the first exception of defendant, St. Louis & San Francisco Railroad Company, and erred in sustaining the first exception of defendant, St. Louis & San Francisco Railroad Company, and erred in sustaining the first exception of the defendant, St. Louis-San Francisco Railway Company, to the report theretofore filed in said cause by Hon. Thomas T. Fauntleroy, Special Master.

II

That the Court erred in sustaining the second exception of the defendant, St. Louis & San Francisco Railroad Company, and the second exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

III

That the Court erred in sustaining the third exception of the defendant, St. Louis & San Francisco Railroad Company and the third exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

IV

That the Court erred in sustaining the fourth exception of the defendant, St. Louis & San Francisco Railroad Company, and the fourth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

[fol. 225] V

That the Court erred in sustaining the fifth exception of the defendant, St. Louis & San Francisco Railroad Company and the fifth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

# VI

That the Court erred in sustaining the sixth exception of the defendant, St. Louis & San Francisco Railroad Company and the sixth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

#### VII

That the Court erred in sustaining the seventh exception of the defendant, St. Louis & San Francisco Railroad Company, and the seventh exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

## VIII

That the Court erred in sustaining the eighth exception of the defendant, St. Louis & San Francisco Railroad Company, and the eighth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

#### IX

That the Court erred in sustaining the ninth exception of the defendant, St. Louis & San Francisco Railroad Company, and the ninth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

### X

That the Court erred in sustaining the tenth exception of the defendant, St. Louis & San Francisco Railroad Company, and the tenth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

#### XI

That the Court erred in sustaining the eleventh exception of the defendant, St. Louis & San Francisco Railroad Company, and the eleventh exception of the defendant, St.

[fol. 226] Louis-San Francisco Railway Company, to the report of said Special Master.

#### XII

That the Court erred in sustaining the twelfth exception of the defendant, St. Louis & San Francisco Railroad Company, and the Twelfth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

# HIX

That the Court erred in sustaining the thirteenth exception of the defendant, St. Louis & San Francisco Railroad Company, and the thirteenth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

#### XIV

That the Court erred in sustaining the fourteenth exception of the defendant, St. Louis & San Francisco Railroad Company, and the fourteenth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

## XV

That the Court erred in sustaining the fifteenth exception of the defendant, St. Louis & San Francisco Railroad Company, and the fifteenth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

### XVI

The the Court erred in sustaining the sixteenth exception of the defendant, St. Louis & San Francisco Railroad Company, and the sixteenth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

#### XVII

That the Court erred in sustaining the seventeenth exception of the defendant, St. Louis & San Francisco Railroad Company, and the seventeenth exception of the de-

fendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

### XVIII

That the Court erred in sustaining the eighteenth exception of the defendant, St. Louis & San Francisco Railroad Company, and the eighteenth exception of the defend-[fol. 227] ant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

# XIX

That the Court erred in sustaining the nineteenth exception of the defendant, St. Louis & San Francisco Railroad Company, and the nineteenth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

### XX

That the Court erred in sustaining the twentieth exception of the defendant, St. Louis & San Francisco Railroad Company, and the twentieth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

#### XXI

That the Court erred in sustaining the twenty-first exception of the defendant, St. Louis & San Francisco Railroad Company, and the twenty-first exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

#### XXII

That the Court erred in sustaining the twenty-second exception of the defendant, St. Louis & San Francisco Railroad Company, and the twenty-second exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master,

# HIXX

That the Court erred in sustaining the twenty-third exception of the defendant, St. Louis & San Francisco Railroad Company, and its twenty-third exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

# XXIV

That the Court erred in sustaining the twenty-fourth exception of the defendant, St. Louis & San Francisco Railroad Company, and the twenty-fourth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

### XXV

That the Court erred in sustaining the twenty-fifth exception of the defendant, St. Louis & San Francisco Railroad Company, and the exception of the defendant, St. [fol. 228] Louis-San Francisco Railway Company, to the report of said Special Master.

# XXVI

That the Court erred in sustaining the twenty-sixth exception of the defendant, St. Louis & San Francisco Railroad Company and the exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

#### XXVII

That the Court erred in sustaining the twenty-seventh exception of the defendant, St. Louis & San Francisco Railroad Company, and the twenty-seventh exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

# XXVIII

That the Court erred in sustaining the twenty-eighth exception of the defendant, St. Louis & San Francisco Railroad Company, and the twenty-eighth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

### ZIZZ

That the Court erred in sustaining the twenty-ninth exception of the defendant, St. Louis & San Francisco Railroad Company, and the twenty-ninth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

### XXX

That the Court erred in sustaining the thirtieth exception of the defendant, St. Louis & San Francisco Railroad Company, and the thirtieth exception of the St. Louis-San Francisco Railway Company, to the report of said Special Master.

## IZZZI

That the Court erred in sustaining the thirty-first exception of the defendant, St. Louis & San Francisco Railroad Company, and the thirty-first exception of the St. Louis-San Francisco Railway Company, to the report of said Special Master.

# IIZZZI

That the Court erred in sustaining the thirty-second exception of the defendant, St. Louis & San Francisco Railroad Company, and the thirty-second exception of the St. [fol. 229] Louis-San Francisco Railway Company, to the report of said Special Master.

## HIZZZ

That the Court erred in sustaining the thirty-third exception of the defendant, St. Louis & San Francisco Railroad Company, and the thirty-third exception of the St. Louis-San Francisco Railway Company, to the request of said Special Master.

# XXXIII.

That the Court erred in sustaining the thirty-fourth exception of the defendant, St. Louis & San Francisco Railroad Company, and the thirty-fourth exception of the St. Louis-San Francisco Railway Company, to the report of said Special Master.

# XXXXV

That the Court erred in sustaining the thirty-fifth exception of the defendant, St. Louis & San Francisco Railroad Company, and the thirty-fifth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

# LIXXI

That the Court erred in sustaining the thirty-sixth exception of the defendant, St. Louis & San Francisco Railroad Company, and the thirty-sixth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

# XXXVII

That the Court erred in sustaining the thirty-seventh exception of the defendant, St. Louis & San Francisco Railroad Company, and the thirty-seventh exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

# XXXVIII

That the Court erred in sustaining the thirty-eighth exception of the defendant, St. Louis & San Francisco Railroad Company, and the thirty-eighth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

# XXXXIX

That the Court erred in sustaining the thirty-ninth exception of the defendant, St. Louis & San Francisco Railread Company, and the thirty-ninth exception of the de-[fol. 230] fendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

# XL

That the Court erred in sustaining the fortieth exception of the defendant, St. Louis & San Francisco Railroad Company, and the fortieth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

# XLI

That the Court erred in sustaining the forty-first exception of the defendant, St. Louis & San Francisco Railroad Company, and the forty-first exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

# ZLII

That the Court erred in sustaining the forty-second exception of the defendant, St. Louis & San Francisco Railroad Company, and the forty-second exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

# XLIII

That the Court erred in sustaining the forty-third exception of the defendant, St. Louis & San Francisco Railroad Company, and the forty-third exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

# XLIV

That the Court erred in sustaining the forty-fourth exception of the defendant, St. Louis & San Francisco Railroad Company, and the forty-fourth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

# XLV

That the Court erred in sustaining the forty-fifth exception of the defendant, St. Louis & San Francisco Railroad Company, and the forty-fifth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

# XLVI

That the Court erred in sustaining the forty-sixth exception of the defendant, St. Louis & San Francisco Railroad Company, and the forty-sixth exception of the defend-[fol. 231] ant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

# XLVII

That the Court erred in sustaining the forty-seventh exception of the defendant, St. Louis & San Francisco Railroad Company, and the forty-seventh exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

# XLVIII

That the Court erred in sustaining the forty-eighth exception of the defendant, St. Louis & San Francisco Railroad Company, and the forty-eighth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

# XLIX

That the Court erred in sustaining the forty-ninth exception of the defendant, St. Louis & San Francisco Railroad Company, and the forty-ninth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

#### L

That the Court erred in sustaining the fiftieth exception of the defendant, St. Louis & San Francisco Railroad Company, and the fiftieth exception of the defendant, St. Louis-

San Francisco Railway Company, to the report of said Special Master.

#### LI

That the Court erred in sustaining the fifty-first exception of the defendant, St. Louis & San Francisco Railroad, Company, and the fifty-first exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

## LII

That the Court erred in sustaining the fifty-second exception of the defendant, St. Louis & San Francisco Railroad Company, and the fifty-second exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

### LIII

That the Court erred in sustaining the fifty-third exception of the defendant, St. Louis & San Francisco Railroad Company, and the fifty-third exception of the defendant, St. [fol. 232] Louis-San Francisco Railway Company, to the report of said Special Master.

#### LIV

That the Court erred in sustaining the fifty-fourth exception of the defendant, St. Louis & San Francisco Railroad Company, and the fifty-fourth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

#### LV

That the Court erred in sustaining the fifty-fifth exception of the defendant, St. Louis & San Francisco Railroad Company, and the fifty-fifth exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

#### LVI

That the Court erred in sustaining the fifty-sixth exception of the defendant, St. Louis & San Francisco Railroad Company, and the fifty-sixth exception of the defendant,

St. Louis-San Francisco Railway Company, to the report of said Special Master.

## LVII

That the Court erred in sustaining the fifty-seventh exception of the defendant, St. Louis & San Francisco Railroad Company, and the fifty-seventh exception of the defendant, St. Louis-San Francisco Railway Company, to the report of said Special Master.

#### LVIII

That the Court erred in dismissing the intervenors intervening petitions and supplemental intervening petitions of both E. B. Spiller and E. B. Spiller, et al.

#### LIX

That the Court erred in disallowing the claims of said intervenors, E. B. Spiller and E. B. Spiller, et al.

#### LX

That the Court erred in denying the claims of said intervenors, E. B. Spiller and E. B. Spiller et al., for preferential payment of the claims of said intervenors.

# LXI

That the Court erred in denying the claims of said intervenors, E. B. Spiller and E. B. Spiller et al., for prefer[fol. 233] ential payment, and erred in ruling and holding
that said claims were not prior in right and superior in
equity to the claims of all other creditors of said defendants, including bondholders.

#### LXII

That the Court errred in disallowing the claims of intervenors, E. B. Spiller and E. B. Spiller et al., in the sum of \$35,465.80 with interest from Aug. 1, 1916, and in not entering judgment accordingly.

# LXIII

That the Court erred in disallowing the claims of intervenors, E. B. Spiller and E. B. Spiller et al., for preferential payment in the sum of \$35,465.80, with interest from August 1, 1916, and in not entering judgment accordingly.

### LXIV

That the Court erred in not finding and holding that the said intervenors, E. B. Spiller and E. B. Spiller et al., were entitled to all the relief prayed in their respective intervening petitions and supplemental intervening petitions, and in not entering judgment accordingly.

# LXV

That the Court erred in disallowing the claims of intervenors, E. B. Spiller and E. B. Spiller et al., for attorneys' fees, prayed for in their respective intervening petitions and supplemental intervening petitions, and in not entering judgment accordingly.

# LXVI

That the Court erred in not holding and finding that the said intervenors, E. B. Spiller and E. B. Spiller et al., were entitled to attorney's fees, as prayed in their respective intervening petitions and supplemental intervening petitions, and in not entering judgment accordingly.

Wherefore, by reason of the aforesaid errors, herein complained of, said intervenors, E. B. Spiller and E. B. Spiller et al., pray this Honorable Court to reverse the decree of Honorable Walter H. Sanborn, District Judge sitting in the District Court as aforesaid, entered in the matters of said interventions in the above entitled cause, signed under date of August 19, 1922, and filed and entered of record of said cause under date of August 23, 1922, and that said matters be remanded to said District Court, with instructions to enter a decree in favor of said intervenors [fol. 234] and each of them, as prayed for in their respective interventions.

S. H. Cowan, John S. Leahy, David A. Murphy, Walter H. Saunders, Solicitors for Intervenors.

# IN UNITED STATES DISTRICT COURT

Order Allowing Appeal—Filed February 17, 1923

Now, on this day, come the above named intervenors, E. B. Spiller and E. B. Spiller, et al., and present their petition for appeal from the order entered on August 23rd, 1922, in the above entitled proceedings to the United States Circuit Court of Appeals, Eighth Circuit, and present therewith their assignment of errors, their appeal bond in the sum of Five Hundred and no/100 Dollars (\$500.00) and pray that citation issue to defendants, St. Louis & San Francisco Railroad Company and St. Louis-San Francisco Railway Company, returnable in sixty days from the date thereof; and the Court doth:

Order that said appeal be allowed as prayed, that said bon 1 be approved and that citation issue to defendant, as prayed.

(Signed) C. B. Faris, Judge.

"The appellants gave an appeal bond in this case in due form of law, which was properly allowed and approved by the Court:"

# IN UNITED STATES DISTRICT COURT

Election as to Printing—Filed February 17, 1923

To the Clerk of said Court:

You are hereby notified that the above named E. B. Spiller and E. B. Spiller, et al., Intervenors in the above entitled cause, and Appellants in the United States Circuit Court of Appeals, hereby elect to take and file in said Court of Appeals in typewritten form a transcript of the record [fol. 235] and proceedings in said interventions, the same to be printed under supervision of the Clerk of said Court of Appeals.

(Signed) S. H. Cowan, John S. Leahy, David A.

Murphy, Walter H. Saunders.

# IN UNITED STATES DISTRICT COURT

Precipe for Transcript of Record—Filed February 19, 1923

The Clerk of said Court is hereby requested to make a transcript of the record of appeal of E. B. Spiller and E. B. Spiller et al., Interveners in the above entitled cause, from orders made in said cause by Honorable Walter H. Sanborn, Circuit Judge, filed on the 23d day of August, 1922 disallowing intervening petitions and supplemental intervening petitions of both E. B. Spiller and E. B. Spiller et al., Interveners herein, disallowing the claims of said interveners and denying the claims of said interveners and denying the claims of said interveners to priority in the payment of their claims against said defendant, and to include in said transcript of the record the following papers and no others:

(1) Bill of complaint of the North American Company, Plaintiff vs. St. Louis & San Francisco Railroad Company, Defendant, In Equity No. 4174.

(2) The consent of the defendant to the appointment of

a Receiver;

(3) The order appointing a receiver;

(4) The petition of intervention of E. B. Spiller and order granting leave to file;

(5) The petition of intervention of E. B. Spiller et al.;

and order granting leave to file;

(6) The supplemental petition of intervention of E. B. Spiller; and order granting leave to file:

(7) The supplemental petition of intervention of E. B.

Spiller et al.; and order granting leave to file;

(8) The answers of the defendant and St. Louis-San Francisco Railway Company to the petition of intervention of E. B. Spiller;

[fol. 236] (9) The answers of the defendant and St. Louis-San Francisco Railway Company to the supplemental peti-

tion of intervention of E. B. Spiller;

(10) The answers of the defendant and St. Louis-San Francisco Railway Company to the petition of intervention of E. B. Spiller, et al.;

(11) The answers of the defendant and St. Louis-San Francisco Railway Company to the supplemental petition of intervention of E. B. Spiller, et al.

(12) Any other answers filed by any other parties to said proceeding, to said cause, to said interventions or either

of them, if any shall have been filed;

(13) The order of reference of said interventions to Hon. T. Fauntlerov, Special Master.

(14) The reports of the Special Master on said inter-

ventions;

(15) All evidence taken by the Special Master and returned with his Report;

(16) Stipulation of counsel for the consolidation of the interventions of E. B. Spiller and E. B. Spiller et al.;

(17) Order consolidating said interventions;

(18) The Exceptions to the Report of the Special Master filed by the defendant St. Louis & San Francisco Railroad Company and St. Louis-San Francisco Railway Company.

(19) The opinion and orders filed in said cause by Honorable Walter H. Sanborn, Circuit Judge pertaining to said Interventions herein;

(20) The petition for an appeal and the allowance thereof:

(21) The Citation;

(22) The Assignment of Errors;

(23) The Præcipe for a Transcript;

(24) The Summary of receipts and disbursements attached to each of the reports of the Special Master; [fol. 237] (25) Summary of receipts and disbursements attached to each of the reports of the Receiver from the — day of ——, 19—, to the — day of ——, 19—.

S. H. Cowan, John S. Leahy, David A. Murphy, Walter H. Saunders, Solicitors for Petitioners.

Service of copy of foregoing præcipe acknowledged this 19th day [—] Feby., 1923.

(Signed) E. T. Miller, Atty. for St. L. S. F. Ry. Co. and St. L. and S. F. R. R. Co.

"By orders duly entered of record, the time for filing the transcript herein was extended from April 17, 1923 to May 9, 1924."

# IN UNITED STATES DISTRICT COURT

# Summary of Evidence-Filed June 16, 1924

#### CAPTION

In the Matter of the Intervening Petition and Supplemental Petition of E. B. SPILLER et al. No. 402

In the Matter of the Intervening Petition and Supplemental Petition of E. B. Spiller. No. 403

Testimony taken in the matter of the intervening petition and the supplemental intervening petition of E. B. Spiller et al. No. 402, and in the matter of the intervening petition and supplemental intervening petition of E. B. Spiller No. 403, before the special master, Honorable Thomas T. Fauntleroy, at room 1025 Frisco building, in the city of St. Louis, State of Missouri

Be it remembered that on the 29th day of November, 1921, the above entitled matters coming on to be heard before Honorable Thomas T. Fauntleroy, Special Master, at Room 1025 Frisco Building, in the City of St. Louis, State of Missouri, all the parties to the record having been given due notice of the hearing, D. A. Murphy, S. H. Cowan, John S. Leahy, and Walter H. Saunders, appearing for and on [fol. 238] behalf of the Intervening petitioners, E. B. Spiller and E. B. Spiller, et al., and W. F. Evans and E. T. Miller, appearing for and on behalf of the defendant, St. Louis & San Francisco Railroad Company, and the St. Louis-San Francisco Railway Company, the following proceedings were had therein, to-wit:

STIPULATION TO TRY ALL INTERVENING PETITIONS TOGETHER

It was stipulated and agreed by and between the intervenors, and the defendant, and the St. Louis-San Francisco Railway Company, that the original and supplemental intervening petitions of E. B. Spiller and the original and supplemental intervening petitions of E. B. Spiller, et al., be tried together, and that the evidence adduced herein will apply to all four intervening petitions. (page 2.)

Mr. Miller: Then they may be all tried together. It is understood that the defendant and the receivers made certain objections to the filing of the interventions and to the hearing of the interventions. These objections were made before Judge Sanborn, when the application for leave to file was heard, and Judge Sanborn overruled the objections.

That the Master may understand the situation, in our answers here we are setting up the same grounds, among others, that we advanced before Judge Sanborn to the filing of the interventions, and our appearing now and taking testimony and making stipulations in the case it is understood will not be deemed a waiver of the objections that we made to the filing and to the hearing of the interventions; in other words, we are preserving all of our objections.

# COLLOQUY BETWEEN MASTER AND COUNSEL

Mr. Murphy: We contend that the order on our petition for leave to file intervening petitions made by Judge Sanborn settles that issue. We don't want to put ourselves in the position of even agreeing to go behind Judge Sanborn's

opinion on the matter.

In 1903 various railroad companies increased their rates on cattle to the primary markets three cents a hundred pounds. In 1904 the Cattle Raisers' Association of Texas filed a petition before the Interstate Commerce Commission in which it was alleged that those increases were unreasonable and unjust to the extent of the increase, and asked that they be so declared. At that time I might say to your Honor the Interstate Commerce Commission had no power to fix rates for the future. In August, 1905, the Interstate Commerce Commission after a full hearing made a finding [fol. 239] and order on that petition. It held that the rate put into effect in 1903 was unjust and unreasonable to the extent of the increase of three cents, and that the railroad companies should be required to desist from charging it. The Cattle Raisers' Association thought that the findings of fact in that opinion were not sufficient and they filed a petition for more specific findings of fact. Of course, that held up the actual order requiring the railroad companies to desist from charging it. In 1906 the Hepburn bill was passed, amending the Act to Regulate Commerce, and for the first time by it the Interstate Commerce Commission

was given power to fix rates for the future. After the law went into effect the Cattle Raisers' Association filed an amended or supplemental petition in which they asked for the relief that they had asked for in their original petition. and in which they asked that the Commission fix a reason-The Interstate Commerce able rate and for reparation. Commission summoned all of the railroad companies involved and another and rather extensive hearing was held. After the evidence was completed the Interstate Commerce Commission in April, 1908, handed down an opinion and decision in which they reaffirmed their conclusions handed down in 1905 in which they fixed the new rate, the rate fixed being the rate that obtained in 1903 before the raise: holding, however, in that opinion that in considering claims for reparation they would not consider any claims that had accrued prior to the filing of that petition, which was August 28 or 29, 1906. Subsequently they considered the question of reparation and in 1914, January I think, they made orders of reparation. Mr. Spiller was the assignee of a great many claims of shippers, having become such prior to the order of reparation. There were other claims that had not been assigned to him, so that really we have this situation: That an order of reparation was made in favor of Spiller against all the roads to the extent of the overcharges, as assignee, and then orders of reparation were made in favor of a large number of shippers, including Spiller, who at some subsequent time had become assignee of some few shippers. Copies of those orders, as required by the Interstate Commerce Commission, were served upon all the railroad companies, including the St. Louis and San Francisco, which refused to comply with the orders of reparation, or refused to repay these overcharges to shippers. I might say here that the Interstate Commerce Commission gave the carriers six months from the date of the order of reparation to make the payment, and shortly after the expiration of that six months suits were filed against the individual rairoad companies in Fort Worth, suits against [fol. 240] the [indiv-ual] railroad companies were filed in Kansas City, and suits against the railroad companies jointly were filed at Kansas City. The reason for the filing of those suits was that they wanted to be sure of jurisdiction. I think that individual suits against some of the railroads, including the Frisco, were filed down here. Service was had upon all the roads, including the Frisco, in the cases

that we call the joint cases at Kan-as City. They appeared and answered. The District Court at Kansas City rendered judgment in favor of the plaintiffs in both those suits. We may refer to those suits in the evidence and in the trial as 4308 and 4320.

The Master: Was that in the District Court at Kausas

City?

Mr. Murphy: In the District Court at Kansas City. All of the defendants, including the St. Louis and San Francisco Railroad Company, appealed from the judgment of Judge Van Valkenburgh to the Circuit Court of Appeals. Judgment in those cases was rendered by Judge Van Valkenburgh on August 16, 1916. On the 28th day of August. 1916, the railroad companies had completed at least the preliminary steps of their appeals. They had sned out writs of error, writs of error had been granted, orders made, assignments of error filed, and I think in most cases appeal bonds filed. Those cases were presented in the Court of Appeals, and in 1918-I don't remember just the date-that will appear from the testimony-the Circuit Court of Appeals reversed the judgment of Judge Van Valkenburgh and remanded the cases. Plaintiff went to the Supreme Court of the United States on a writ of certiorari and writs of error both. The Supreme Court entertained the writ of certiorari, and after argument and further briefing of the cases there the Supreme Court in saw of the last days of May, 1920, reversed the Circuit Court of Appeals and affirmed the decision of Judge Van Valken burgh.

The Master: Pardon me. Wasn't the point raised whether or not you should have filed your bill before the

court in the receivership proceedings?

Mr. Murphy: No, that is the one point that we think Judge Sanborn has settled in granting our bill. Of course, you may desire to hear evidence on that, but I think that Judge Sanborn's order overruling the objecting to the filing of the bill of intervention and allowing it to be filed was a final order. Practically the same objections to the grant-[fol. 241] ing of the petition for leave to intervene were made before Judge Sanborn as are now set up in the pleas in bar here.

Mr. Murphy: When the judgment was originally readered by Judge Van Valkenburgh under the Act to Bogulate Commerce be made an allowance for attorneys fore and taxed them as costs. When the cuse back from the Supreme Coart we filed and application for an additional allowance of attorneys fees. That was sustained in July, 1920, and an additional allowance sands, taxvel as costs in the case. As I said a minute ago, the railroad companies had given appeal bands. Of course, this suit against the Frison was filed in Kansas City after the receivership procoodings howe had commenced, and the bond I prosume was arranged for by the receiver. At any rate, the railway companies paid the penalty of that bond, using part of the moneys thus paid to pay the court costs proper, and the balance, so for as it would go, was applied upon the attorneys fine taxod as rosts. But the poundty of the head was not sufficient to cover the entire amount of the attorneys fine taxod as ousits. so we are seeking to recover those attorneys five taxod as rosts under what will be designated here as the supplemental bill of intervention, which will be filed after objections made to Judge Samborn upon an order granting us hown in the it made by Judge Sanborn. Our grounds to roomer those costs are different from the grounds that we argo for the recent of the enceutaneous

The Master: Does this proceeding include the claim for everlarges and attorneys free?

Mr. Murphy: In the main intercention we are asking that the claim for overcharges be allowed as a claim prior in equity and superior in right.

The Master: Well, you are asking those for attorneys fees?

Mr. Murphy: Not in the intervention, but for attornover fees taxed as costs in the District Court in the Western Bistrict of Missouri in the main case there, but we are asking for an attorneys fees for any service condened after the order of Judge Van Valkouburgh in July making an additional order for attorneys fees. The grounds for our chain that these attorneys fees should be taxed as costs are based [fol. 242] on the services rendered in our saits in the Bistrict Court, in the Court of Appends and in the Signomac Court.

It was agreed between the parties, for the purpose of the round, that case No. 732-No. A583-Cattle Raisers' Assa. ciation vs. The Missouri-Kansas & Texas Railway Company, was decided by the Interstate Commerce Commission, on January 12, 1914, (p. 8); that the case bore that number all the way through from 1904, when the order of reparation was made; that the St. Louis and San Francisco Railroad Company, advanced its rates in March, 1903, that being the advance in rates complained of in this proceed. ing; that the petition complaining of the advance in rules was filed February 10, 1904, and alleged that the rates were unreasonable and unjust; that the rates were held unreasoughte by the Interstate Commerce Commission on August 16, 1965, the report of said Commission in said proconding being found in Volume 11, Interstate Commerce Commission reports, at page 298; that a new petition was filed by the Intervenors on August 29, 1906, and that the rate was again held to be unreasonable by the Interstate Commerce Commission on April 14, 1908; said report being found in Volume 12, Interstate Commerce Commission Reports, at page 419; that the new rates were made effective on November 17, 1908; that sait was filed in the United Sitatos District Court at Kansas City, Missouri, on January 19, 8915 (p. 9),

The Master: Mr. Murphy, are you presenting this now on the theory to establish your position that you have been diligently pursuing your remedy?

Mr. Marphy . Von.

Intervenors offer the following documentary evidence (P. S):

Mr. Murphy: I offer opinion and finding of the Interstate Commerce Commission, dated August 16, 1965. \* \* \* I will identify it as the opinion and finding of the Interstate Commerce Commission, reported in 11 Interstate Commerce Reports, at page 298. For the information of the Master, I will here read into the record one short paragraph, because that may obviate the necessity of going to the Report for it.

Mr. Miller: Well, I want to make an objection to the offer on the specific grounds set forth in the answers of the

defendant, and of the railway company. Objection is made to the introduction of this evidence by both of those parties. It is further objected to because the judgment in the Federal Court at Kansas City, Missouri, merged all prior [fol. 243] claims against the defendant therein. The testimony therefore, is not material for any purpose in this case.

Which objection was by the Special Master overruled; to which action and ruling of the Special Master, defendant, by counsel, then and there duly excepted and still excepts (P. 10).

Said opinion and finding was marked Exhibit 1, and is in words and figures as follows, to-wit:

"In order to avoid the expense of printing, the decision of the Interstate Commerce Commission, in the case of The Cattle Raisers' Association of Texas vs. The M. K. & T. Railway Company, et al, No. 732, 11 I. C. C., p. 296, reference is hereby made to said case, reported in said volume, and decided August 16, 1905."

Upon request of counsel for defendant, it was ordered by the Special Master that in making the specific objections that are contained in the answers of the defendant and the St. Louis-San Francisco Railway Company, counsel may merely refer to said objections without restating them (P. 10).

Counsel for intervenors then read from the report and spinion of the Interstate Commerce Commission just offered:

y "Conclusions: It has been found that the advances made during the year 1903, as shown by the Appendix, were unjust and unreasonable, and that the present rates are unjust and unreasonable by the amount of said advances. The defendant therefore should be required to cease and desist from the maintenance of these rates."

The motion of the defendant to strike out that part of the report and opinion read by counsel for interveners was merraled; to which action and ruling of the Special Master, defendant, by counsel, then and there duly excepted and still excepts. (P. 10.)

Mr. Murphy: We now offer in evidence petition of the Cattle Raisers' Association of Texas to reopen the case, filed August 29, 1906.

Mr. Miller: Same objection.

[fol. 244] The Master: It looks to me that all of these bear upon the idea advanced by Judge Sanborn as showing due diligence on the part of these petitioners, that they throw light upon the transaction. I think that any steps that were taken by these parties in presenting their claim come within the purview of Judge Sanborn's order. I overrule the objection.

To which ruling of the Special Master, defendant duly eceptxed and still excepts (p. 11).

Mr. Miller: I take it, also, that it is not necessary to make a motion to strike out the testimony; that we may consider that a motion to strike out has been made.

Mr. Murphy: That is satisfactory to us.

Said paper last offered was marked Exhibit 2, and same is in words and figures as follows, to-wit: IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

NORTH AMERICAN COMPANY, Complainant,

VS.

St. Louis & San Francisco Railroad Company, Defendant

In the Matter of the Intervening and Supplemental Intervening Petitions of E. B. Spiller et al. Intervening Petion No. 402

In the Matter of the Intervening and Supplemental Intervening Petitions of E. B. Spiller. Intervening Petition No. 403

Consolidated under the Style: In the Matter of the Interventions of E. B. Spiller et al. Consolidated Cause, Final, No. 4174

EXHIBIT 2—STIPULATION AS TO PETITION OF CATTLE RAISERS'
ASSOCIATION TO REOPEN CASE

It is hereby stipulated and agreed by and between the above named interveners, and the St. Louis & San Francisco Railroad Company, and the St. Louis-San Francisco Railway Company, parties herein, that the Clerk of this Court may omit from the transcript of the record and proceedings in this cause to be filed in the United States Circuit Court of Appeals, Eighth Circuit, interveners' Exhibit No. 2, the petition of the Cattle Raisers' Association [fol. 245] of Texas, to reopen case, referred to in the interveners' summary of evidence filed herein.

(Signed) John S. Leahy, Walter H. Saunders, D. A. Murphy, S. H. Cowan, Attorneys for Interveners. W. F. Evans, E. T. Miller, Attorneys for St. Louis & San Francisco Railroad Co. and St. Louis-San

Francisco Railway Company.

August 21st, 1924.

Mr. Murphy: I offer the decision of the Interstate Commerce Commission, November 14, 1906, on the petition for a more specific finding of fact.

Mr. Miller: Same objection.

The Master: Paper will be received.

To which ruling of the Master the defendant then and there duly excepted and still excepts (p. 11).

Said paper was marked Exhibit 3 and is in words and figures as follows, to-wit:

# Ехнівіт 3

Exhibit 3—Opinion of Interstate Commerce Commission on Petition to Reopen Case

# No. 732

The Cattle Raisers' Association of Texas

V.

Missouri, Kansas and Texas Railway Company et al.

Petition to Reopen Case Filed August 29, 1906; Submitted November 9, 1906; Decided November 14, 1906

This case was decided in favor of complainant August 16, Subsequently complainant's motion for additional and more specific findings was granted, and the case again taken under advisement. The Act to Regulate Commerce was amended June 29, 1906, and thereafter complainant filed its petition praying in substance that the Commission [fol. 246] proceed in the case with a view to making an order therein under the new fifteenth section in said act. The new section 15 confers upon the Commission power to enforce what has always been required in the statute, namely, just and reasonable rates, by the application of a new remedy, and, as applied to cases like this, in that way alone has the jurisdiction of the Commission been enlarged. The new section provides as conditions that there shall be formal complaint and full hearing. Both of these prerequisites have been practically complied with in this proceeding, but both complainant and defendants should have

leave to submit whatever additional testimony they desire, and thereupon it is not only the right, but the imperative duty of this Commission, to make an order for or against the defendants under the new fifteenth section. To hold otherwise, this case and many others in which large sums of money and much time have been expended must fail, since the old section is superseded by the new, and the amending act contains no provision continuing the old section in force as to cases previously brought before the Commission; the law should not be so interpreted in the absence of explicit provision to that effect. Case set down for further hearing, reexamination of the whole record by the Commission, and procedure under the new fifteenth section.

# Report and Opinion of the Commission

PROUTY, Commissioner:

February 10, 1904, the complainant filed its petition alleging that certain advances in rates on live stock from various points in the Southwest to Kansas City and other live-stock markets were unjust and unreasonable, and praying that the Commission would order the defendants to cease and desist from continuing such rates in effect and for reparation. To this the defendants made answer that the advanced rates were just and reasonable.

Upon the issue thus formed a great mass of testimony was taken and elaborate arguments presented; and on August 16, 1905, the Commission filed its report and opinion sustaining, in the main, the contention of the complainant. On November 18 following the complainant filed with the Commission a motion for additional and more specific findings. This motion was granted and the matter again taken under advisement for that purpose. No additional findings have yet been made, and the case is still pending. No order has ever been made.

[fol.247] On June 29, 1906, the Act to Regulate Commerce was amended. The fifteenth section of that act as thus amended provides that the Commission, in a proper case, shall have authority, and that it shall be its duty, if in its opinion a given rate in unjust and unreasonable to prescribe a just and reasonable rate which shall not be exceeded by the defendant in the future. Subsequent to the

taking effect of this amendment the complainant filed this petition, praying, in substance, that the Commission proceed in the case to the making of an order under the new fifteenth section. This petition has been served upon the defendants, who have made various answers and objections, all of which come, however, to the proposition that this Commission has no authority to make an order under the new fifteenth section in this proceeding for the reason that such an order can not be entered in a case which was pend-

ing when the amendment took effect.

This petition was referred to in the argument by counsel for both the complainant and the defendants as a supplemental petition under section 16a, but it is evident that this provision of the statute has no application. That section is intended to give the Commission the right to rehear a matter for the purpose of correcting any injustice in its previous order. The petition before us alleges no such wrong and asks for no such change. Its only purpose is to secure from the Commission an order under the amended section 15, which could not have been made upon the same state of facts when the original complaint was filed or when the report and opinion of the Commission was first rendered. The sole question for consideration is, Can the Commission make its order under the fifteenth section upon a complaint filed previous to the date when the amended section went into effect? The defendants insist that this amended section confers upon the Commission a new jurisdiction, in that the Commission is given authority to prescribe a rate for the future, and that this new jurisdiction can only be exercised upon a complaint filed subsequent to the time when the jurisdiction was conferred.

The Act to Regulate Commerce has always provided that the rates charged by carriers subject to its provisions should be just and reasonable. In this respect the law stands today precisely-as it has stood from the beginning. Under the act previous to this amendment it was the right of a party to complain that rates were unjust and unreasonable, and it was the duty of the Commission to consider that complaint in precisely the same way that it is now. If it found that the rate was unjust and unreasonable it [fol.248] was its further duty, in passing upon a demand for reparation, to determine by how much that rate had been un-

just in the past. Looking to the future, however, it could only direct the carrier to cease and desist from charging the unreasonable rate. To-day in this later respect it can go further and can fix the rate, which the carrier may not exceed. In other words, the amended act confers upon the Commission power to enforce what has always been a requirement of the statute by the application of a new remedy. In this sense alone can it be said that the amended fifteenth section, as applied to a case like that before us, enlarges the jurisdiction of the Commission.

But if it be true that Congress has thereby conferred upon this body additional jurisdiction, it is clear that in so doing Congress might also prescribe the conditions upon which that jurisdiction should be exercised, and this is explicitly done in the fifteenth section itself. Before the Commission can make an order under that section two conditions must be complied with: first, a formal complaint must have been filed under the thirteenth section; second, there

must have been a full hearing of the parties.

In the amendments of June 29 the thirteenth section was in no respect changed. If this complainant were to file to-day its complaint against these rates, that complaint might well be in the precise form of the original complaint in this proceeding, excepting only its prayer for specific relief, which is not essential. We have, therefore, a compliance with the first prerequisite to the exercise of this jurisdiction, in that, in this case, there has been filed a complaint under the thirteenth section.

The second condition precedent is that a full hearing shall be granted. Certainly the hearing upon this record has been sufficiently full. More than six weeks were expended in the taking of testimony, which, as extended, covers several thousand typewritten pages. It would seem that every fact which could have the slightest bearing upon the subject has been elaborated and every consideration dwelt upon.

But it is said that the question now presented is different, from the question presented then; that the question then was, Is the rate charged unreasonable? that the question now is, What will be a reasonable rate for the future? [fol. 249] It was the duty of the Commission in disposing

of this complaint under the former statute to determine

whether the rates charged by the defendants were just and reasonable, and if it found them unjust and unreasonable to determine by how much, in order that reparation might be awarded. It is now necessary to determine by how much these rates are unjust and unreasonable, looking to the future. While this question is, strictly speaking, a new one, and while it is conceivable that the Commission might find that a rate would be reasonable for the future which had been unreasonable in the past, it is probable that the character of the testimony introduced upon the hearing of complaints like that before us in the future will not differ much from what it has been in the past.

But if the fact be otherwise, if the carriers have failed to produce any evidence either because the decision of the Commission was not, in their estimation, of the same importance before as now, or because the issue of fact is different now than formerly, or if conditions have changed since this testimony was taken, their rights in the premises can be and should be amply protected. All the parties, both complainant and defendants, should be allowed to introduce whatever additional testimony they may desire. It is difficult to see why, when such opportunity for further hearing has been given, the second prerequisite to the making of an order under the fifteenth section will not have been fully met. If so, it is not only the right of this body but it becomes its imperative duty under that section to proceed to the making of such an order.

This view is confirmed by a consideration of what would be the consequence of a contrary holding. The fifteenth section was amended by rewriting the section itself. There is to-day no fifteenth section as it existed when this complaint was filed, and there is no provision under which the terms of that section have been continued in force. If, therefore, it should be held that this Commission has no authority to make an order in the case before us under the fifteenth section as it now stands, it must follow that no order of any sort can be made: in other words, that this proceeding has been ended by legislative enactment. When it is remembered that there were pending before this Commission a great number of complaints at the time of this amendment in all stages of advancement, that in many of them large sums of money and much time had been expended in the

taking of testimony, it is incredible that Congress can have [fol. 250] intended to arbitrarily and unnecessarily terminate these suits which had been brought and prosecuted in good faith under the law as it previously stood. Certainly, no interpretation should be given this statute which will produce such a result in the absence of explicit language to that effect.

We think that this case should be set down for further hearing; that both the complainant and the defendants should be allowed to introduce such additional testimony as they may be advised; that thereupon the Commission should justice requires, and that upon this conclusion it should proceed under the fifteenth section, as it now stands, to the making of an order.

At this point it was agreed by and between counsel for interveners and counsel for the defendant, that the Answers prepared on the part of the defendant, copy of which had been sent to opposing counsel, might be considered filed as of November 28th, 1921.

Mr. Murphy: I now offer the report and opinion of the Interstate Commerce Commission in the case of the Cattle Raisers' Association of Texas vs. Missouri, Kansas & Texas Railway Company, et al. No. 723, decided April 14, 1908, 13 I. C. Report, at page 419.

Mr. Miller: Same objection.

Objection overruled.

To which ruling of the Master defendant then and there duly excepted.

Mr. Murphy: In this opinion and report the Commission reaffirms the conclusion rendered in its report and decision of August 16, 1905, in which it was held that the rate was unreasonable and unjust to the extent of the increase of three cents, and that the railroad companies should be required to desist from charging it.

Said paper marked Exhibit 4, and same is in words and figures as follows, to-wit:

[fol. 251]

Ехнівіт 4

No. 732

CATTLE RAISERS' ASSOCIATION OF TEXAS

VS.

Missouri, Kansas & Texas Railway Company et al.

Submitted June 28, 1907. Decided April 14, 1908

Report of the Commission

PROUTY, Commissioner:

Between February, 1899, and April, 1903, the defendants made marked advances in their rates upon live stock from breeding pastures of the Southwest north of the quarantine line to northern ranges and from various maturing points west of the Missouri River to the principal markets of consumption. For the purpose of attacking these advances this petition was filed February 10, 1904. A very large amount of testimony was taken during the year 1904; the case was submitted, after elaborate argument, in the spring of 1905, and on August 16, 1905, the Commission filed its report, condemning, generally, the last advance, and holding that previous advances were justifiable, 11 I. C. C. Rep. 296.

Upon the promulgation of that opinion the complainant filed with the Commission an application for more specific findings as to the advances which were condemned, and this petition was under advisement by the Commission in June, 1906, when the last amendments to the Act to Regulate Commerce were adopted. On August 29, 1907, after those amendments had become effective, the complainant filed with the Commission a request that it proceed to the making of an order in the premises under the authority conferred upon it by the amended act. The defendants denied the authority of the Commission to do this, insisting that the case must be disposed of under the provisions of the

act in force when the testimony was taken and the original report filed.

The Commission held that no order could be made by it except as provided under the amended act, but that it was the right of both parties to be further heard before the making of such an order. The case was accordingly set down for further hearing, with notice to both parties that they would be allowed to introduce such additional testimony and to present such additional arguments as they might desire.

Acting under this permission, considerable testimony was introduced by both parties, and the case has been reargued. [fol. 252] Generally speaking, the additional testimony is merely cumulative, although both sides insist that there have been some changes in condition since the former submission of the case which make in their favor.

When the former report was prepared the statute required the Commission to state the findings of fact upon which its conclusions were based, and this was done in the report of August 15, 1906, at considerable length. No question has been raised in these subsequent proceedings as to the correctness of the greater part of these findings, but counsel for the defendants did claim, upon argument, that in certain of them the Commission had fallen into error. We are no longer required to state our findings of fact, but it is our duty to carefully re-examine, in disposing of this case, the entire record, and it seems proper, in this connection, to refer briefly to the criticisms of the defendants upon our former findings.

The first of these, as stated in the brief of the defendant, is that the Commission compared the train loading of live stock with the train loading of trains which contain less than carload freight. This the defendant urges was wrong, for the reason that live stock is uniformly shipped in carloads and that therefore any comparison between that and other freight should be made with carload freight.

Witnesses for the defendants in great number had testified that the average cost of handling all other kinds of freight, including both carload and less than carload, was less than the cost of handling live stock. Mr. Peabody, whose calculations will be later referred to, had presented

very elaborate figures in which he contrasted the oust of transporting live stock with the average cost of transporing all other kinds of freight, carboad and less than carboad.

For the purpose of estimating the force of this testimony the Commission instituted certain comparisons between the train loading and the train mileage of live stock and other freight. Manifestly, our comparisons to be of value and fair to the complainant must be upon the same basis with those made by the witnesses of the defendants; and sine, they had embraced both carbond and less than carbond freight it was incumbent upon us to do the same.

The testimony in this case apparently showed that the average tons of paying freight, in trains consisting ofther wholly or in part of live stock, was greater than the tons [fol. 253] of paying freight in the average train upon most

or all of the lines of the defendants.

It also apepared that the average rate per ton-mile soceived by most of these defendants for the handling of lise stock was greater than the average rate for the handling of all traffic, and usually considerably greater. If the number of tons of paying freight in a live-stock train was greater than the number of tons in the average train, and if the mice per ton-mile applied to the movement of live stock was greater than the average rate applied to the movement of all traffic, it seemed to us then, and it seems, to us still, that this is persuasive evidence that the profitableness of landling live stock as actually handled by these defendants, notwithstanding the many disabilities under which that traffic rests, was above the profitableness arising from the handling of all freight, on the average.

The defendants also claim that the Commission outed in its finding as to the regularity with which this traffic mous-

The carriers had alleged as one of the reasons why this live-stock business was undesirable that its movement was spasmedic and uncertain. The Commission refused to autain this contention and found, upon the contrary, that live stock moved with great regularity, instancing as illustrative receipts at Chicago, both of the market as a whole and over individual lines. It is now said that Chicago is not a representative market, and a statement is presented showing the curs of live stock handled into Kansan Chy by the Atchison System during certain years. things was soluted as being the jargest leaded the let in the United States. An examination of the figures proceeded by the Sparia We appropriately anticome state the movement of like study to Kansas City is not quite as uniform as the movement to Chicago over that the Climinating, however, that your when fluid conditions at Kansas City practically interconnect all traffic for several weeks, to movement as shown by these statements is still somewhat mixture.

What she Commission and it its foreign separt was that while this traffic moved at one season of the year from multiply and at another season from motion builties, there different movements countrabaliment such after as that as applied to the great systems, which are mainly affected by this proceeding, the movement as a whole was committantly regular. With that finding we are assessly carried. It is laid [14] stantistic whether the Santa Fy System tombles my single community in here quantities with request to which the time of its movement and the amount of the movement and the amount of the movement and the amount of the starts.

It is further channel that our cellmate of the schitter amount of damages paid for injuries to live study in straight in proportion to the gross recording declared from the basiness, is altogether too small. From the testimony of the malle manager of the Archaen, Popula & Santa Fe again the former leasting, we found that this presentings of damages on account of live study disputants to carraings from soft chapmons was 1.25 gas rose, and the represent the union that this would not be far from the account in square of all the defendants under mount conditions. Wastone flows lines now the statements, chaving a much integer presentings, and the Santa Fe leadly shows that the years 1906 the proceedings in the case was \$100.

According to the Sunta Fo statement, produced again the former total, the gross sum paid by that system for such diminges for the seven years from June 36, 3898, in June 30, 3808, in June 30,

As indicated in our former report, the service rendered by certain of these lines in the Southwest has been in recent years extremely poor, and for the last two years this has been even worse than before. Not only have these defendants uterly failed to discharge their duty as common carriers engaged in the shipment of live stock and thus subjected themselves to heavy claims for damages, but this failure upon their part has inflamed public opinion and perhaps led to the institution of more suits and the giving of larger verdicts than otherwise. It is certainly true that many of these Texas lines have actually paid damages much in excess of the percentage found by this Commission, but this seems to be due to local conditions for which the carriers themselves are mainly responsible and in respect of which they are legally at fault. As applied to the defendants as a whole we still think that our former finding sufficiently favorable.

In so far as this traffic is by nature hazardous, the rate for its movement may properly reflect that hazard; but in so far as these damages are due to gross shortage of duty upon the part of the defendants, they can not be al-[fol. 255] lowed to revenge themselves upon the shipping public by a corresponding increase in their charges for

transportation.

What is most dwelt upon by the defendants is the treatment accorded the testimony of Mr. Peabody, the statistician of the Atchison System. It was insisted upon the former argument, and is reiterated with great earnestness now, that the figures presented by this witness are a conclusive demonstration against the contention of the complainants. Several particulars are pointed out in which it is said that we either failed to apprehend the position of Mr. Peabody or have not fairly treated his testimony. In view of the earnest insistence by the defendants that the evidence of this witness must control the disposition of this case, it seems proper to refer to it somewhat more in detail than would otherwise be necessary.

What Mr. Peabody has attempted to do was fully stated our former report, and may be briefly indicated here. He takes the operating divisions of the Santa Fe System, over which this traffic mostly moves, and determines the total amount of money expended in the maintenance and operation of each one of these divisions for a given year. He apportions the total amount between passenger and freight and divides the amount applicable to freight by the total number of tons hauled over the division during the year, including the weight of the car, and determines in this

manner the cost of hauling a gross ton.

He then starts with a carload of cattle, the average weight of which can be known with accuracy, and determines the cost of hauling this car over the various divisions by multiplying the number of gross tons by the gross ton cost upon each division, obtaining, in this way, what he styles the "operating cost" of moving this car from its point of origin to destination. To this he adds interest and taxes, distributed upon a car mileage basis, thus obtaining what he terms the "total cost of moving a carload of cattle." arriving at this cost he assumes that about 90 per cent of stock cars are returned empty, and charges upon the same gross ton basis for this empty haul. He now inquires what revenue his company receives for the handling of this car. If this is more than the total cost he denominates the difference a profit, and if less a deficit.

[fol. 256] Upon the former hearing Mr. Peabody introduced a table showing, upon the above basis, the results of transporting live stock from some twenty or thirty different points, mostly in the State of Texas, to Kansas City, Chicago, and St. Louis. These shipments sometimes showed a profit and sometimes a deficit, as above defined. He added together the profits and the deficits, subtracted the sum of the profits from the sum of the deficits, divided the remainder by the total number of points, and deduced the conclusion that there was a deficit, on the whole of some

\$5 per car.

Many of the points thus selected were not upon the line of his system, which received the traffic from its various connections at junction points. It determining the financial result to his company he had taken as the revenue not the rate from the junction point to destination, but the division of the through rate received by the Santa Fe System. For example, the rate from Fort Worth to Kansas City is 36½ cents per 100 pounds, while the division allowed to Santa Fe on business originating at some point beyond Fort

Worth and received by that company at this junction would be perhaps 23 cents per 100 pounds. In determining whether the rate from point of origin was reasonable he considered not the total thorugh rate, but the amount which his company received as its division.

The Commission was of the opinion that the contention before it was upon the reasonableness of the rate from the point of origing to destination, and not whether, under stress of competition, the Santa Fe obtained less than its fair share of this rate. It accordingly eliminated from Mr. Peabody's table of points of origin those points not upon the lines of the Santa Fe and proceeded to strike a balance with the remaining points in exactly the same way that Mr. Peabody had struck his balance with the whole. The result then was not a deficit, but a profit of some \$14 per ear. It is now insisted that this proceeding upon the part of the Commission was entirely unfair, and Mr. Peabody presents, as a part of his recent testimony, a table of stations entirely on his own line which shows not a profit, but a deficit.

As previously pointed out by the Commission, the whole calculation is practically worthless, and the above statement clearly shows this. Mr. Peabody, by selecting the proper points, can show either a deficit or a profit, as he sees fit. The points which he originally selected showed a profit; those which he now selects a deficit. To be of any [fol. 257] value whatever, his computations should take all points in the territory involved. We are still of the opinion, however, that the fundamental question before us is not whether this traffic is profitable to the Santa Fe System, which may handle it under disadvantageous circumstances, but whether the rates are reasonable.

Some time ago the Texas & Pacific Railway Company canceled all joint through rates upon live stock from points upon its line, and these rates were subsequently re-established by an order of this Commission. It is now suggested that, inasmuch as the Santa Fe System is handling this traffic under compulsion of this order, its divisions of these through rates may properly be considered as they were by Mr. Peabody. In answer to this it should be noted that while the Commission had indeed established joint through

rates in the application of which certain of these divisions are accepted by the Santa Fe System, it has never been asked to establish the divisions themselves, and has never expressed an opinion upon their reasonableness. The Santa Fe accepts its low division from Fort Worth, not under an order of this body, but because, for competitive reasons, it

must do so.

In determining the cost of transporting a gross ton of freight over the various divisions of his system, Mr. Peabody must, of necessity, apportion certain expenses, like those of maintenance, in toto, and those of operation, in part between passenger and freight service. The Commission pointed out in its former report that in the early history of this body it had required railways in making their statistical returns to undertake to make an apportionment of this sort, but had later ab indoned that requirement at the request of the railways themselves, as not sufficiently reliable to be of much value. Mr. Peabody now undertakes to fortify his method of distributing these expenses by further testimony of his own and by the opinion of expert witnesses.

We did not decline to accept the conclusions of Mr. Peabody because he had found it necessary to make this distribution of expense between freight and passenger service; that was simply pointed out as one of the incidental infirmities in his calculation. The testimony since introduced adds nothing upon that point. This body has just promulgated, under express statutory authority, a uniform system of accounts for use by the various railways of this [fol. 258] country. We have not there required the separation of freight and passenger expenses. Such information would be of great value, but, is the opinion of our own statistician and of the accountants of most railways, it can not be furnished with sufficient accuracy to be of value as statistics. We repeat here what was said before, that such a distribution can have "only the reliability of an estimate."

The real objection to Mr. Peabody's conclusion arises not out of the accuracy of his figures, but from the fundamental errors in his method. What he does is to determine the average cost of handling a gross ton of freight over certain divisions of his system. In arriving at this result, he must of necessity, consider the movement of all freight of all kinds. With the cost so reached he contrasts the movement of the traffic in question; that is to say, he compares the movement of a car of live stock from Pecos to Chicago, a distance of 1,350 miles, with the movement of all freight of all kinds upon the line between Pecos and Chicago. He charges, for example, against the movement of that carload of cattle the station expenses of all sorts at every station between those points.

It is well understood that the expense of handling short haul is much greater than that of a long haul traffic. Mr. Peabody himself states that the average haul of a carload of livestock upon that system is 281 miles; yet he contrasts with these distances the movement of this carload 1.350

miles.

It is equally well understood that the cost of handling less than carload traffic is very much greater than that of carload business; indeed. It has been said in testimony before this Commission that it is six or seven times as much. About 7 per cent of all the traffic of the Santa Fe is less than carload. It may very likely cost as much to handle this 7 per cent of less than carload business as it does to handle one-fourth of the entire carload traffic, and yet Mr. Peabody charges this carload of live stock from Pecos with all the expense of the less than carload freight.

Mr. Peabody further assumes that this traffic from distant points moving at it does largely in solid train loads, ought to bear a rate which pays the same profit as traffic which moves over short distances. This is not so. It is universally agreed that the rate per ton mile should decrease as the distance increases, not only for the reason that the cost of service decreases, but also because free communication between distant parts of this country can in

no other way be had.

[fol. 259] One of the principal sources of apprehension expressed by railroad witnesses before the committees of Congres-, when the advisability of conferring upon this Commission the rate-making power was under advisement, was that we should be obliged to adjust rates upon a distance basis. It was earnestly said by railroad representa-

tives that the interstate rates of this country could not be, and ought not to be based on distance. But these defendants are insisting that distance is the proper measure of the reasonableness of a rate, since they insist that long-distance traffic should bear the same proportion of expense as short-distance traffic.

Again, Mr. Peabody of necessity assumes that all kinds of traffic ought to bear the same proportion of expense, since he compares the cost of handling this live-stock business with the cost of moving all freight transported by his system; but it is well understood that the profit made by one commodity need not be, and ought not to be, the same as the profit paid by every other commodity. Undoubtedly, no commodity should be moved at a rate which is less than the cost of the movement; but it can not be said that the rate upon a particular article should yield, if above the cost of movement, any given proportion to the payment of dividends or interest. It will be noted that the amount yielded by these rates, even by the extremely low divisions accepted by the Santa Fe from its connections, in all cases exceeds, by a substantial amount, the cost of operation.

Nothing can be more conclusive against the value of Mr. Peabody's figures than the reductio ad absurdum, which results from an application of his method of calculation to

a case which it is not intended to fit.

Within the year the rate of the Santa Fe company upon cotton piece goods from Kansas City, Mo., to Wichita, Kans., has been challenged by complaint filed with this Commission. That company contended in that proceeding that this rate was reasonable, and we declined to disturb it.

Mr. Peabody was asked to state what profit, according to his method of computation, his company would derive from the transportation of a carload of 60,000 pounds of cotton piece goods between those points, and has filed a statement showing that the entire cost, including taxes and interest, of operating this car would be \$23.43, while the revenue derived would be \$396. By profit as here used is meant that portion of the entire revenue which remains for [fol. 260] the payment of dividends after every other expense has been satisfied.

It was stated by a witness thoroughly familiar with livestock rates that the short-distance rates from points in Kansas to Kansas City were among the lowest to be found in this whole country. An application of Mr. Peabody's calculations to these rates for distances up to 300 miles shows a profit of from 30 to 60 per cent. As already said, the average haul of a carload of live stock upon the Santa Fe is, according to Mr. Peabody, 281 miles. Perry, Okla., is situated 324 miles from Kansas City. The total cost of transporting a carload of cattle from Perry to Kansas City, including the return haul of the empty car and taxes and interest, would be, according to the figures of Mr. Peabody, \$34.83, the revenue \$67.80, leaving a net profit applicable to dividends of \$32.97, or something over 48 per cent.

The taxes and fixed charges upon this shipment are \$10.86 in all. When it is remembered that the bonded debt of the Atchison, Topeka & Santa Fe Railway is some \$28,000 per mile, while its capital stock is but \$22,000 per mile, it will be seen that this ratio of profit would yield an utterly

unreasonable dividend.

We do not suggest that the interstate rates upon the Santa Fe System could be or should be adjusted upon the basis adopted by Mr. Peabody, but it does seem manifest that if this method of calculation is to be applied to a portion of its rates it should be extended to the whole. If that system desires to raise its live-stock rates it should correspondingly reduce its merchandise rates. If it proposes to scale up its long-distance rates on live stock, it should scale down, at the same time, the short-distance tariffs applicable to that commodity.

The live-stock rates, by the action of various competitive forces through a long series of years, have become adjusted to other rates. No other commodity is now complaining that the charge against it is too high as compared with that upon live stock. To justify an advance in these rates carriers must either show that they are altogether out of proportion with other rates or that they are in need of greater revenues. We held in deciding this case formerly that the last advances of 1903 were unreasonable, but that former advances had been justifiable. We find nothing in the case as presented now which would alter our conclusion [fol. 261] as of the time when it was reached. There remains, therefore, the further question, Have conditions so changed between 1905 and 1907 that these advances, which were condemned then, should be sanctioned now?

The defendants urge that certain changes have occurred since 1905 which require a modification of the conclusion which we then reached. They urge:

First. That the cattle industry is much more prosperous today that it was then.

Second. That the cost of railroad operation has materially increased since then.

The original complaint sets forth that the cattle industry was extremely depressed, and this was relied upon by the complainant as one of the reasons which should influence us in holding the advances unreasonable. While the Commission fully sustained this claim of the complainant, so far as the fact went, it attached but little importance to it in disposing of the case. We said, at page 348, 11 I. C. C. Rep.:

The depressed condition of this industry has been earnestly pressed upon our attention. We have expressed the opinion elsewhere that freight rates should not of necessity vary with the price of the commodity transported nor with the condition of the business affected. The members of the complainant association cannot require these defendants to make good the depressed state of their industry, but where the rate limits the movement of the traffic, as to some slight extent it does here, that fact is entitled to some consideration, and there is certainly no general prosperity among these shippers in which the defendants are entitled to participate.

It is our impression that the cattle business is somewhat more prosperous today than it was when the case was first submitted. Market prices of beef cattle have materially advanced, but the cost of producing the animal has also increased. In its final analysis the principal item of expense in the raising of cattle is the value of the land upon which the animal grazes and from which it draws in one form and another its subsistence. All land values, especially in the sections covered by these proceedings, have materially increased since 1904, and these advances, together with other increases in cost of labor and various supplies, have added to the expense of producing cattle. The live-stock business as conducted upon the ranges and pastures covered [fol. 262] by this proceeding may be in better shape now

than it was three years ago; but it is not today in what can be termed a state of prosperity. It is true, now, as then, that there is "no general prosperity among these shippers in which the defendants are entitled to participate." We find nothing in the present condition of the live-stock industry which could induce us to modify our former holding.

Comparing April, 1905, when the case was originally submitted, with June, 1907, when the last argument was heard. it is true that the cost of operation has increased. The price of most materials entering into the construction. maintenance, and operation of a railway had somewhat advanced, and material increases in the wages paid railway employees had either actually been made or were in immediate contemplation. It is not certain that today, November, 1907, the price of materials and supplies is greater, if as great, as it was in 1905, and it is not improbable that in the near future these prices may be less. We are not advised what effect, if any, will be produced by the present financial stringency upon the rate of wages paid railway employees. The situation strongly illustrates what this Commission has on several occasions said, that freight rates as a whole should not vary with the price of the commodity carried nor with general business conditions. The railway shares in the general adversity or the general prosperity by loss or gain in the amount of its traffic without change in the rate itself.

It is well settled that, everything else remaining the same, an increase in cost of operation would justify an advance in rates. It is equally well settled that, other things remaining the same, increase in traffic requires a decrease in rates. It may therefore happen that the increase of traffic will more than offset the increase in operating expense, and such has been the fact generally in this country for the last eight years. A table introduced by the complainant, compiled from the returns of various Texas railroads to the railroad commission of that State, forcibly illustrates this. This table, as we understand it, shows, for the eight months ending February 28, 1906, and the corresponding eight months ending February 28, 1907, the gross receipts, the operating expenses, and the net receipts of the various Texas lines. It is not necessary to encumber this report

with the detailed statement, but the summaries may be given, and are:

[fol. 263] Gross receipts for eight months ending February 28, 1906	\$53,640,893	99
Gross receipts for eight months ending February 28, 1907	67,528,212	.07
Increase for the eight months	13,887,318	.08
Percentage of increase, 0.25 plus.		
Operating expenses for eight months ending February 28, 1906	38,550,647	03
Operating expenses for eight months ending February 28, 1907		.56
Increase for the eight months	7,180,668	53
Percentage of increase, 0.18 plus.		
Income from operation for the eight months ending February 28, 1906	15,090,246	.96
Income from operation for the eight months ending February 28, 1907		.51
Increase for eight months	6,706,649	.55

Percentage of increase, 0.44 plus.

It appears, therefore, that notwithstanding increased expenses of operation these Texas lines show an increase in gross income of over 25 per cent; in operating expenses of over 18 per cent, and in net income of over 44 per cent.

These returns apply to operations in the State of Texas alone, but conditions throughout a large part of the territory embraced in this proceeding are fairly typified by these results in Texas. These defendants are likely to stand in much sorer need of additional revenue during a period of financial depression, accompanied by declining cost of operation than during periods of prosperity while prices of supplies and labor are advancing. An increase of operating cost in sections of the country where no corresponding increase in traffic could be expected might merit

different consideration. (This was written in October, 1907. What has since occurred abundantly justifies the suggestion.)

Certain of the Texas lines have urged upon the Commission with great force their financial necessities. They show that in order to properly transact the business offered extensive outlays must be made upon their properties; that under the laws of the State of Texas they can make no further issue of stock or bonds; that the money for these expenditures can only be obtained from current revenue, and they insist that their rates should be such as will provide the necessary revenue out of which to improve their properties.

[fol. 264] The Texas stock and bond law requires the railroad commission of that State to value the various railroad properties in the State, and provides that the combined issue of stocks and bonds shall not exceed this valuation.

Many, and perhaps most, of these Texas lines were cheaply constructed at the outset and were bonded for more than the cost of construction. When, therefore, the commission of Texas valued these railroads upon the basis of cost of reproduction, as it did, the values thus fixed fell, in most cases, far below the outstanding issues of stocks and bonds.

The original cheap construction of these Texas lines answered fairly well for the movement of the lighter traffic handled at the time they were built, but today, under the enormous increase in business which has taken place, that construction is entirely inadequate. Most of these lines have been improved to a considerable extent, and some of them have been put into shape to meet the requirements of the present, but many of them must be virtually recoustructed in the immediate future. They must be regraded, laid with heavier steel, ballasted, and re-equipped, if their business is to be transacted upon a reasonable rate at a reasonble profit. Since the roads, even after all these improvements are made, will still be, if valued upon basis of the cost of reproduction, worth less than the present issue of stocks and bonds, it follows that no funds can be provided for these improvements by the issue of additional securities, and that money must be obtained either by carrying the

loan as an unsecured indebtedness or from revenue. Some of these Texas lines have strong parent companies outside the State which can supply their necessities, but the above statement applies to many of the more important Texas railroads.

While this condition is a most unfortunate one, we cannot believe that it affords a sufficient ground for the establishment or rates by this Commission which would otherwise be unjust and unreasonable. It will hardly be claimed by anyone that these railroads at the beginning should have been allowed to impose upon the public rates sufficient to repay. within a few years, the original cost of construction, and there is no better reason for saving that they should be allowed now to impose rates which will pay, out of current earnings, this cost of reconstruction made necessary by the increase in their business. Any outlay which is not required to keep the property good, or, perhaps, more accurately stated, to keep the property up to present standards, but which is necessary to provide for the handling of increased business, and which, therefore, adds to the perma-[fol. 265] nent earning capacity of the property, should, as between the railway and the public, when the railway demands the right to increase a rate for the mere sake of additional revenue, be made not out of earnings but out of capital or surplus. Such has been the frequent holding of this Commission and that holding has been explicitly affirmed by the Supreme Court of the United States in a Illinois Central R. R. Co. et al. vs. Interrecent decision. state Commerce Commission, 206 U.S. 441, 51 L. ed. 1128. 27 Sup. Ct. Rep. 700.

The Commission had found in that case that extensive permanent improvements had been paid for as a part of operating expenses out of current earnings and had expressed the opinion that such expenditures should not be charged against a single year, but "should be, so far as practicable and so far as rates exacted from the public are concerned, projected proportionately over the future." The appellant railway companies argued that this was clearly error upon the part of the Commission. The court held otherwise, using, at page 462 of the opinion, this

language:

The findings show that the old rates were profitable and that dividends were declared even when permanent improvements and equipment were charged to operating expenses. But may they be so charged? Appellants contend that the answer should be so obviously in the affirmative that it should be made an axiom in transportation. On principle it would seem as if the answer should be otherwise. It would seem as if expenditures for additions to construction and equipment, as expenditures for original construction and equipment, should be reimbursed by all of the traffic they accommodate during the period of their duration, and that improvements that will last many years should not be charged wholly against the revenue of a single year.

The court then proceeded to discuss and distinguish Union Pacific Railroad Co. vs. United States, 99 U. S. 402, 25 L. ed. 274, and concluded its discussion with these words:

\* \* But such is not the relation or concern of a shipper of lumber. His right is immediate. He may demand a service. He must pay a toll, but a toll measured by the reasonable value of the service. The elements of that value may be many and complex, not always determinable, as we have seen, with mathematical accuracy, but we think it is clear that instrumentalities which are to be used for years should not be paid for by the revenues of a day or year; and this is the principle of returns upon capital which exists in durable shape.

[fol. 266] The situation presented by these Texas roads might afford a very good reason for allowing new securities to be issued against the money which actually goes into the improvement of these properties; it is not a reason for an unreasonable transportation charge; nor, even if this were not so, would it be just to the public to allow the necessities of these few Texas roads to impose upon the entire community a burden which, with respect to the great majority of the lines and the greater part of the traffic involved, would be unjust and unreasonable.

It is our opinion, therefore, that the advances shown in the appendix to our former report, which is referred to and made a part of this report, which were effected by the defendants during the year 1903, were unjust and unreasonable; that the present rates produced by those advances are unjust and unreasonable; that the rates in effect previous to said advances would be just and reasonable and ought not to be exceeded for the future.

It will be seen by reference to this appendix that the advances thus condemned are but a small part of the total advances made during the years 1898-1903, inclusive.

On June 1, 1894, railways entering the city of Chicago imposed a terminal charge of \$2 per car for the delivery of carloads of live stock at the Union Stock Yards. This complaint alleges that the imposition of that terminal charge, which is still in effect, is unjust, unreasonable, and discriminatory, and asks that the same be abolished.

The lawfulness of that charge has been the subject of extensive litigation before this Commission in the past, and we may refer to the various reports touching that subject without attempting to repeat here the facts involved. Cattle Raisers Asso. of Texas et al. vs. Fort Worth & Denver City Ry. Co. et al., 7 I. C. C. Rep. 513; ibid., 7 I. C. C. Rep. 555a; Cattle Raisers Asso. of Texas et al. vs. Chicago, Burlington & Quincy Railroad Co. et al., 10 I. C. C. Rep. 83; ibid., 11 I C. C. Rep. 277; ibid., 12 I. C. C. Rep. 507.

The stock yards at Chicago are owned by the Union Stock Yards & Transit Co. which also owns the tracks connecting the lines of the various railways entering Chicago with the stock yards. Previous to June 1, 1894, the Stock Yards & Transit Co. had allowed the various railways to operate their trains of live stock over its tracks to the stock yards without payment of other compensation than an unloading charge of 25 cents per car; but beginning June 1, 1894, they imposed for the use of these tracks a trackage charge which [fol. 267] varied, in different cases, according to the length of the haul, from 80 cents to \$1.50 per car. Thereupon the railways imposed the \$2 terminal charge.

The Commission held that previous to June 1, 1894, rates on live stock to Chicago had included a delivery at the stock yards; that these rates were sufficiently high, and that the cost of this service had been in no way increased on June 1, 1894, except by the imposition of this trackage charge. We therefore concluded that the imposition of that charge was unjust and unreasonable, except in so far

as it was justified by the trackage charge then first made by the Stock Yards & Transit Co., and we allowed, for reasons stated in the original opinion, the imposition of a uniform charge of \$1 by all the defendants.

If the reductions ordered in this case are made the rates thus established will still be, from all the territory involved, higher—in many cases materially higher—than they were on June 1, 1894, and immediately previous thereto. We are of the opinion that if these reductions are made the rates thus established will be sufficiently high to include a delivery at the stock yards, and that no terminal charge in addition to the rates so fixed should be allowed in excess

of \$1 per car.

After the making of its order by the Commission in the original case, directing that the terminal charge should not exceed \$1, a petition was filed in the circuit court, on the part of the Commission, to enforce obedience to that order. and this proceeding came by appeal into the Supreme Court of the United States. It appeared in the report of the Commission, which was before the Supreme Court in that proceeding, that subsequent to June 1, 1894, rates from certain sections in the Southwest to Chicago had been reduced by the amount of 5 cents per 100 pounds, or from \$10 to \$12 per car. This left the total rate from those points to Chicago less than it was before the imposition of the \$2 charge, and since there was nothing to show why this reduction had been made the Supreme Court was of the opinion that it must be assumed, in the absence of such testimony, that the total rate, including the terminal charge. was after this reduction, reasonable, and therefore that the terminal charge might be properly imposed upon shipments from that territory to which the 5-cent reduction applied. Since, further, the report of the Commission did not define that territory the court held that the order of the Commission by reason of this indefiniteness could not be enforced in any part, and dismissed the petition of the Com-[fol. 268] mission without prejudice as to the territory not covered by the 5-cent reduction.

The defendants claim that with respect to the territory covered by the 5-cent reduction this terminal charge has become res judicata by this decision of the Supreme Court and that the Commission can no longer examine that question with respect to this territory. While we hold otherwise, since the advances made since the decision of the Supreme Court have more than offset the reduction of 5 cents, it seems proper to define that territory in order that the court, should it be of a different opinion, may modify our order or remand the case to the Commission for the purpose of doing so upon its present record. That territory was as follows:

The entire State of Texas north and west of the Galveston, Harrisburg & San Antonio Railway and the Houston, East & West Texas Railway, including stations on the former and excluding those on the latter; also all stations in Indian Territory and Oklahoma Territory upon the Missouri, Kansas & Texas Railway, the Rock Island System, including the St. Louis & San Francisco Railroad, and the Atchison System.

It should be carefully noted that this is not a reduction in rates, but the condemnation of an advance, and that the advance which we condemn was not a first nor even a second, but a third advance made within the period of three years. It should be further noted that the rates which we leave in effect are higher than these carriers had maintained save for a single month from the time tariffs were first filed with this Commission down to the date of the advance.

These advances were made during the year 1903 and were generally 3 cents per 100 pounds. In a few cases they were as high as 5 cents and as low as one-half cent. It is evident that in such instances it was the purpose of the carriers to change the relation in rates. Presumably the old relation was wrong in the opinion of the carriers and the present relation is right. If we were simply to order a reduction to the original basis the present relation would be disturbed in these instances, and yet we cannot well make any different order, since these rates have not been specially referred to. The better way seems therefore, to be to allow the carriers sufficient time within which to put in rates in substantial accord with this report, and the making of an order will therefore be postponed until July 1, 1908.

[fol. 269] Questions as to reparation are reserved and will be dealt with as specific claims are presented. It is proper to state here, however, that we have decided that no

reparation can be allowed upon claims accruing prior to August 29, 1906, when the complain-t filed its petition with the Commission to proceed under the amended act.

Mr. Murphy: I now offer the unreported opinion No. A-583 of the Interstate Commerce Commission in Case No. 732, Cattle Raisers' Association of Texas vs. Missouri, Kansas & Texas Railway Company, et al., decided January 12, 1914.

Same objection and same ruling. To which ruling of the Master the defendant then and there duly excepted.

Said paper was marked Exhibit 5 and is in words and figures as follows, to-wit:

Exhibit 5—11-29-21. D. J. F.

Interstate Commerce Commission

No. 732

CATTLE RAISERS' ASSOCIATION OF TEXAS

VS.

Missouri, Kansas & Texas Railroad Company et al.

Filed August 15, 1923. Decided January 12, 1914

Supplemental Report of the Commission

Prouty, Commissioner:

The Commission, in its former report in this case, 13 I. C. C., 418, 435, stated that reparation would be awarded from August 29, 1906. Claims for reparation were filed with the Commission covering shipments both before and after this date, but no claims are embraced in this report where delivery was made previous to the date above given.

These claims, as filed with the Commission, describe in detail the shipments on account of which reparation is claimed, stating the point of origin and the point of delivery and the carrier making the delivery. By the direction

of the Commission, a list of the cars with respect to which claims have been filed was furnished to each one of these delivering lines, which was requested by the Commission to check the claims against their records with a view to ascer-[fol. 270] taining how many of the cars moved as appeared from the records of the defendants. These claims have been checked by these delivering roads, and no carloads are embraced in this report which did not appear from the records of the defendants to have moved as stated.

In all cases in this report the point of origin, the point of delivery, and the delivering road are named. The complainant has no way of determining the originating carrier, where the point of origin is served by two or more carriers, nor the intermediate carrier, where such a carrier partici-

pated in the transportation.

These shipments of live stock were in all cases consigned to some person at the delivering market, usually a commission firm. The consignor paid the freight in the first instance to the delivering carrier in all cases. Subsequently the cattle were sold upon the market and the amount of the freight deducted from the purchase price, remittance being made for the balance. In all cases, therefore, the owner and shipper of the cattle finally paid the transportation charges.

The table attached to and made a part of this report, as Appendix A, shows with reference to all shipments whose movement was admitted by the defendants the point of origin, the point and road of delivery, the rate of freight which was paid, the rate which should have been paid, and the difference between the amount of freight which was paid and the amount which should have been paid. In some cases the weight of the shipment did not appear, and in all such instances the minimum carload has been applied, since under their tariffs, the carriers must have collected at least upon the minimum.

Referring to Appendix "A," we find that the persons named in the column marked "consignor" shipped from the points named in the column marked "origin" to points named in the column marked "destination," by the line of road named as the "delivering road," the number of cars specified in the column headed "number of cars," of the aggregate net weight stated in the column marked "weight." We further find that said shippers paid to said

delivering carriers freight upon these shipments at the rate which is named in the column headed "rate paid." We find that this rate was unreasonable and excessive and that a reasonable rate to have been charged on the several shipments at the time they were made would have been that rate named in the column marked "rate ordered," which was subsequently established by the Commission, and that therefore the said delivering carriers collected from the [fol. 271] said shippers unreasonable charges on account of the shipments by the amount named in the column headed "amount of refund." We further find that by these unreasonable exactions of the said carriers the said shippers were damaged in the amounts stated in said lastnamed column, si e they received for their cattle less by those amounts than they would have received had the rate found reasonable been charged, and that said shippers are entitled to reparation in the amounts so specified, with interest from the date of the delivery of the shipment at 6 per cent, which said interest has been computed and is stated in the column marked "interest."

In case of certain of the above claims the shipper made an assignment to H. E. Crowley, at that time secretary of the Cattle Raisers' Association. The form of this assignment was the same in all cases, and was as follows:

In consideration of One Dollar to me in hand paid by H. E. Crowley, Secretary, as well as other considerations good and valuable to me, I hereby transfer and assign to him absolutely, any and all right of action, claims, or demands which I now have, or may hereafter have, against each and every Railway Company over whose railroad I have shipped any cattle, for reparation or reimbursements on account of any excessive, unreasonable, discriminatory, or otherwise unlawful or unjust freight rates or other charges which I have paid to such railway company on such shipments, as per schedule of said shipments hereto attached.

Having assigned my said claim as aforesaid, I also delegate to said H. E. Crowley, Secretary, full authority in establishing said claim to collect data and evidence in relation thereto from all Commission Companies, persons

or firms as if I were personally present and acting in the premises.

Witness my signature hereto.

Sign here: ----

Post Office address: ----

We find that this assignment was made by the shipper in all cases where, in Appendix "A," the name of such shipper is followed by the letter "C." Subsequently Crowley ceased to be secretary of the Cattle Raisers' Association and was succeeded by E. B. Spiller, and thereafter the ship-[fol. 272] pers assigned certain other claims to Spiller. The form of assignment used was in all cases the same as that which had formerly been employed in making the assignment to Crowley. We find that those shippers whose names are followed by the letter "S" made assignments in this manner to Spiller.

After Crowley ceased to be secretary of the Cattle Raisers' Association he assigned all claims which had previously been assigned to him to his successor. Spiller, by assignment in due form, so that Spiller now has whatever right and title Crowley originally took under the assign-

ments to him.

The attorney for the complainants contended that all claims assigned to Spiller directly, or to Crowley and by him to Spiller as above, were so vested in Spiller that he was entitled to demand and receive payment of the amount of reparation due from the defendants, and that the order of reparation should be made in his favor. Upon the request of the attorney of the complainants the Commission orders payment of reparation to E. B. Spiller in all cases where such assignments were made as indicated in the appendix aforesaid. Where no assignment has been made the order will run directly in favor of the owner as shown by said appendix.

All the claims mentioned in the above appendix, with respect to which reparation is allowed, were filed with the Commission within less than two years from the date when the shipment was delivered to the consignee by the deliver-

ing road.

An order will be entered accordingly.

(Pages 4 to 62 omitted as same are identical with exhibit attached to intervening petition of E. B. Spiller heretofore set out.)

# Order

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 12th Day of January, A. D. 1914

No. 732

CATTLE RAISERS' ASSOCIATION OF TEXAS

vs.

MISSOURI, KANSAS & TEXS RAILWAY COMPANY et al.

This case coming on to be further heard upon prayer for reparation, and having been duly submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date herof, made and filed a supplemental report containing its [fol. 273] findings of fact and conclusions thereon, which said supplemental report is hereby referred to and made a part thereof:

It is ordered and directed that The Atchison, Topeka & Santa Fe Railway Company, on or before June 15, 1914, pay to E. B. Spiller the amounts to which the said Spiller, as assignee, is entitled as reparation and interest thereon under the said report with respect to the several shipments named in said report in case of which the freight money was paid to the said Atchison, Topeka & Santa Fe Railway Company as therein shown, being in the aggregate the sum of \$27,832.60 principal and \$10,459.42 interest.

It is further ordered and directed, that the Chicago & Eastern Illinois Railroad Company, on or before June 15, 1914, pay to E. B. Spiller the amounts to which the said Spiller, as assignee, is entitled as reparation and interest thereon under the said report with respect to the several shipments named in said report in case of which the freight money was paid to the said Chicago & Eastern Illinois Railroad Company as therein shown, being in the aggregate the sum of \$1,360.02 principal and \$470.47 interest.

It is further ordered and directed that The Chicago & Alton Railroad Company, on or before June 15, 1914, pay to E. B. Spiller the amounts to which the said Spiller, as assignee, is entitled as reparation and interest thereon under the said report with respect to the several shipments named in said report in case of which the freight money was paid to the said Chicago & Alton Railroad Company as therein shown, being in the aggregate the sum of \$572.79 principal and \$189.70 interest.

It is further ordered and directed that The Chicago, Rock Island & Pacific Railway Company, on or before June 15, 1914, pay to E. B. Spiller the amounts to which the said Spiller, as assignee, is entitled as reparation and interest thereon under the said report with respect to the several shipments named in said report in case of which the freight money was paid to the said Chicago, Rock Island & Pacific Railway Company as therein shown, being in the aggregate the sum of \$13,218.16 principal and \$4,821.81 interest.

It is further ordered and directed that the Illinois Central Railroad Company, on or before June 15, 1914, pay to E. B. Spiller the amounts to which the said Spiller, as assignee, is entitled as reparation and interest thereon under the said report with respect to the several shipments [fol. 274] named in said report in case of which the freight money was paid to the said Illinois Central Railroad Company as therein shown, being in the aggregate the sum of \$1,536.93 principal and \$592.03 interest.

It is further ordered and directed that the Missouri, Kansas & Texas Railway Company, on or before June 15, 1914, pay to E. B. Spiller the amounts to which the said Spiller, as assignee, is entitled as reparation and interest thereon under the said report with respect to the several shipments named in said report in case of which the freight money was paid to the said Missouri, Kansas & Texas Railway Company as therein shown, being in the aggregate the sum of \$39,777.74 principal and \$15,002.17 interest.

It is further ordered and directed that The Missouri Pacific Railway Company, on or before June 15, 1914, pay to E. B. Spiller the amounts to which the said Spiller, as assignee, is entitled as reparation and interest thereon under the said report with respect to the several shipments named in said report in case of which the freight money was paid to the said Missouri Pacific Railway Company as therein

shown, being in the aggregate the sum of \$224.81 principal and \$86.15 interest.

It is further ordered and directed that the St. Louis, Iron Mountain & Southern Railway Company, on or before June 15, 1914, pay to E. B. Spiller the amounts to which the said Spiller, as assignee, is entitled as reparation and interest thereon under the said report with respect to the several shipments named in said report in case of which the freight money was paid to the said St. Louis, Iron Mountain & Southern Railway Company as therein shown, being in the aggregate the sum of \$2,736.35 principal and \$958.51 interest.

It is further ordered and directed that the St. Louis & San Francisco Railroad Company, on or before June 15, 1914 pay to E. B. Spiller the amounts to which the said Spiller, as assignee, is entitled as reparation and interest thereon under the said report with respect to the several shipments named in said report in case of which the freight money was paid to the said St. Louis & San Francisco Railroad Company as therein shown, being in the aggregate the sum of \$20,211.95 principal and \$7,470.80 interest.

It is further ordered and directed that The Texas & Pacific Railway Company, on or before June 15, 1914, pay to E. B. Spiller the amounts to which the said Spiller, as as-[fol. 275] signee, is entitled as reparation and interest thereon under the said report with respect to the several shipments named in said report in case of which the freight money was paid to the said Texas & Pacific Railway Company, as therein shown, being in the aggregate the

sum of \$231 principal and \$97.94 interest.

It is further ordered and directed that The Atchison, Topeka & Santa Fe Railway Company, on or before June 15, 1914, pay to each of the persons named as consignor in said report whose claims have not been assigned to E. B. Spiller or to H. E. Crowley, and by him to E. B. Spiller, as appears from said report, the amount of reparation and interest thereon to which said consignor is entitled, according to the terms of said report, with respect to all those shipments in case of which the freight money was paid by said consignor to The Atchison Topeka & Santa Fe Railway Company.

It is further ordered and directed that the Chicago & Eastern Illinois Railroad Company, on or before June 15,

1914, pay to each of the persons named as consignor in said report whose claims have not been assigned to E. B. Spiller or to H. E. Crowley, and by him to E. B. Spiller, as appears from said report, the amount of reparation and interest thereon to which said consignor is entitled, according to the terms of said report, with respect to all those shipments in case of which the freight money was paid by said consignor to the Chicago & Eastern Illinois Railroad Com-

pany.

It is further ordered and directed that The Chicago & Alton Railroad Company, on or before June 15, 1914, pay to each of the persons named as consignor in said report whose claims have not been assigned to E. B. Spiller or to H. E. Crowley, and by him to E. B. Spiller, as appears from said report, the amount of reparation and interest thereon to which said consignor is entitled, according to the terms of said report, with respect to all those shipments in case of which the freight money was paid by said consignor to The Chicago & Alton Railroad Company.

It is further ordered and directed that The Chicago, Rock Island Pacific Railway Company, on or about June 15, 1914, pay to each of the persons named as consignor in said report whose claims have not been assigned to E. B. Spiller or to H. E. Crowley, and by him to E. B. Spiller, as appears from said report, the amount of reparation and interest thereon to which said consignor is entitled, according to the terms of said report, with respect to all those shipments [fol. 276] in case of which the freight money was paid by said consignor to The Chicago, Rock Island & Pacific Rail-

way Company.

It is further ordered and directed that the Illinois Central Railroad Company, on or before June 15, 1914, pay to each of the persons named as consignor in said report whose claims have not been assigned to E. B. Spiller or to H. E. Crowley, and by him to E. B. Spiller, as appears from said report, the amount of reparation and interest thereon to which said consignor is entitled, according to the terms of said report, with respect to all those shipments in case of which the freight money was paid by said consignor to the Illinois Central Railroad Company.

It is further ordered and directed that the Missouri, Kansas & Texas Railway Company, on or before June 15, 1914, pay to each of the persons named as consignor in said re-

port whose claims have not been assigned to E. B. Spiller or to H. E. Crowley, and by him to E. B. Spiller, as appears from said report, the amount of reparation and interest thereon to which said consignor is entitled, according to the terms of said report, with respect to all those shipments in case of which the freight money was paid by said consignor to the Missouri, Kansas & Texas Railway Company.

It is further ordered and directed that The Missouri Pacific Railway Company, on or before June 15, 1914, pay to each of the persons named as consignor in said report whose claims have not been assigned to E. B. Spiller or to H. E. Crowley, and by him to E. B. Spiller, as appears from said report, the amount of reparation and interest thereon to which said consignor is entitled, according to the terms of said report, with respect to all those shipments in care of which the freight money was paid by said consignor to The

Missouri Pacific Railway Company.

It is further ordered and directed that the St. Louis, Iron Mountain & Southern Railway Company, on or before June 15, 1914, pay to each of the persons named as consignor in said report whose claims have not been assigned to E. B. Spiller or to H. E. Crowley, and by him to E. B. Spiller, as appears from said report, the amount of reparation and interest thereon to which said consignor is entitled, according to the terms of said report, with respect to all those shipments in case of which the freight money was paid by said consignor to the St. Louis, Iron Mountain & Southern Railway Company.

[fol. 277] It is further ordered and directed that the St. Louis & San Francisco Railroad Company, on or before June 15, 1914, pay to each of the persons named as consignor in said report whose claims have not been assigned to E. B. Spiller or to H. E. Crowley, and by him to E. B. Spiller, as appears from said report, the amount of reparation and interest thereon to which said consignor is entitled, according to the terms of said report, with respect to all those shipments in case of which the freight money was paid by said consignor to the St. Louis & San Francisco Railroad Company.

And it is further ordered and directed that The Texas & Pacific Railway Company, on or before June 15, 1914, pay to each of the persons named as consignor in said report whose claims have not been assigned to E. B. Spiller or to H. E. Crowley, and by him to E. B. Spiller, as appears from the said report, the amount of reparation and interest thereon to which said consignor is entitled, according to the terms of said report, with respect to all thoses shipments in case of which the freight money was paid by said consignor to The Texas & Pacific Railway Company.

By the Commission.

George B. McGinty, Secretary. (Seal.)

Mr. Murphy: I now offer the petition of E. B. Spiller, plaintiff, vs. Missouri, Kansas & Texas Railway Company, et al., No. 4308, filed on December 29, 1914, in the District Court of the United States for the Western Division of the Western District of Missouri. Copy of that petition is found on pages 20-21-22-23-24-25-26- and 27 of the abstract of the record filed in the Supreme Court of the United States in an appeal from the Circuit Court of Appeals of the Eighth Circuit.

Mr. Miller: That is objected to for the same reason.

Objection overruled.

To which ruling of the Master the defendant then and there duly excepted.

Mr. Miller: Are you going to leave that document here as an exhibit, Mr. Murphy? Any documents that you introduce that you do not leave copies of here, in the event of an appeal I think that the parties who introduce them should supply the record.

[fol. 278] Mr. Murphy: Yes.

Mr. Miller: And I don't ask that you leave those, because I can probably find them myself.

Said document was marked Exhibit 6, same being in words and figures as follows, to-wit:

Exhibit 6—Filed August 15, 1923. Jas. J. O'Connor, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI, AT KANSAS CITY

No. 4308

E. B. Spiller, Plaintiff,

vs.

Missouri, Kansas & Texas Railway Company et al., Defendant-

Cowan & Burney, Forth Worth Texas: Deattherage & Creason, Kansas City, Mo., attorneys for plaintiff.

Plaintiff's Original Petition

To the Honorable Judge of said Court:

I

E. B. Spiller, plaintiff, who resides in Tarrant County, in the Northern District of Texas, at Fort Worth, complaining of the defendants, Missouri, Kansas & Texas Railway Company, the Missouri Pacific Railway Company, the St. Louis & San Francisco Railway Company, the Atchison, Topeka & Santa Fe Railway Company, the Chicago, Rock Island [Island] & Pacific Railway Company and the Chicago & Alton Railway Company, each of which own and operate their line of railway through the Western District of Missouri and have principal operating offices in said District at Kansas City, Missouri; and the St. Louis Iron Mountain & Southern Railway Company, the Chicago & East Illinois Railway Company and the Illinois Central Railroad Company, which have offices and agents at Kansas City, Missouri; and the Texas & Pacific Railway Company, which has its principal office and agents at Dallas, in Dallas County, Texas, represents:

[fol. 279] II

That the defendants are now and at the dates herein named were common carriers engaged in the transportation of cattle in connection with other lines of railway from points in Texas, Oklahoma and New Mexico to Kansas City and St. Joseph, Missouri, St. Louis, Missouri, National Stock Yards and Chicago, Illinois, New Orleans, Louisiana and to other live stock markets, and were parties to the tariffs of rates, fares and charges constituting joint rates and through routes from the points named in Appendix A to the order of the Interstate Commerce Commission herein referred to and made a part hereof, as Exhibit to this petition, as the rates of shipments shown in said Appendix A.

#### III

That on the 12th day of January, 1914, the Interstate Commerce Commission, after full hearing and in all things proceeding legally, in the cause pending before it, being No. 732, Cattle Raisers Association of Texas et al. vs. Missouri, Kansas & Texas Railway Company et al., in which all of the defendants herein were parties, made its lawful order directing the defendants and each of the carriers named in said order to pay to the plaintiff damages on account of charging said shippers named as consignors in said report and order unjust and unreasonable rates on shipments of cattle shown in said Appendix A in the amounts therein named, said report and order of the Commission being Unreported Opinion No. A-583 hereto attached and made a part hereof as Exhibit A in which the unreasonable rates paid, the rates established by the Commission, the shipments made for which the unreasonable rates were paid, the amount of principal and interest as damages which the defendant- [were] directed severally to pay to plaintiff, are fully set out in connection with the findings in said Supplemental Report and order of the Commission, and in which amounts the shippers named as consignors, who assigned their claims to plaintiff, as therein shown, were damaged by the defendant- and said carriers respectively as found by the Commission, and which the plaintiff as assignee as stated in said report of the Commission is entitled to recover of said carriers defendants respectively as follows:

[fol. 280] Atchison, Topeka &	Principal	Interest
Santa Fe Ry. Co	\$27,832.60	<b>\$10,459</b> 42
Co	1,360.02	470.47
Chicago & Alton Railroad Co Chicago, Rock Island & Pacific	572 79	189.70
Ry. Co	13,218.16	4,821 81
Illinois Central Railroad Co	1,536 93	592 03
Missouri, Kansas & Texas Ry. Co.	39,777.74	15,002 17
Missouri Pacific Railway Co	224.81	86.15
St. Louis & San Francisco R. R. Co. St. Louis, Iron Mountain & South-	20,211 95	7,470.80
ern Ry	2,736.35	958.51
Texas & Pacific Railway Co	231.00	97.94

The detailed claims and amounts sued for herein being for and on account of the shipments made and freight paid to the defendants, ———, by said consignors named in said order and appendix thereto, where the name of the consignor is followed by the letter S. and those followed by the letter C and also under which the abbreviation of the word ditto is used (Do.), meaning a repetition of the preceding line, name and letter indicating to whom the assignment was made as shown by said Report and order of the Commission and explained by notation on page 5 of the Appendix thereto, to recover each and all of which claims and interest the plaintiff sues the defendants in the amounts which the Commission Ordered the defendants to pay as shown by said report and Order.

# IV

That the damages so claimed grew out of the fact that in the year 1903, the defendants and other Railway Companies in said cause 732 and their connecting carriers being engaged in the business of transporting cattle from said points of origin mentioned in said Appendix A to the markets of destinations as shown in said Appendix, on or about March, 1903, advanced the rates for transporting

cattle from said points of origin named in said Appendix A. and from other points, to Kansas City, St. Joseph and St. Louis, Missouri; National Stock Yards and Chicago, Illinois; New Orleans, Louisiana and other points, the amount of the advance applicable to shipments therein specified being the difference between the rates shown in the column of Appendix A marked "Rate paid" and in the column marked "Rate ordered," which "Rate paid" named in said Appendix A the shippers named as consignors in said list were compelled severally to pay to the said carriers respectively as shown in said Appendix A on the shipments which they respectively made, as therein [fol. 281] shown, which advanced rates were found by the Commission to be unjust and unreasonable, and on account of the payment of which on the said shipments, said carriers were ordered and directed to pay the said principal sum and interest to plaintiff as assignee of the said shippers named as consigners, as shown in said report and order of the Commission, Exhibit A hereto.

That after said rates were advanced and on February 10, 1904, the Cattle Raisers Association of Texas, a voluntary organization of live stock producers and shippers of Texas, Oklahoma and New Mexico, brought its complaint before the Interstate Commerce Commission against the said carriers and other carriers and their connecting lines of railway which had established said rates, alleging that said advanced rates were unjust and unreasonable, and the Commission, after full hearing of said complaint, in accordance with the Act to Regulate Commerce, on August 16, 1905. by its report and opinion in Cause No. 732, Cattle Raisers Association of Texas et al. vs. M. K. & T. Rv. Co. et al., reported in 11 I. C. C. 298, found it to be a fact that said advanced rates were unjust and unreasonable and in violation of Section 1 of the Act to Regulate Commerce, as shown by the report of the Commission in said cause last above referred to, which report and opinion as published by the Interstate Commerce Commission is hereby referred to. and plaintiff asks that it be considered a part hereof. That said advanced rates, notwithstanding the said decision of the Commission, remained in effect until November 17. 1908. That while the Commission found, as shown in its

report and opinion, that the said rates on cattle were advanced as aforesaid, and the advances thereof were unjust and unreasonable, no formal order was made by the Commission consequent upon it said report and opinion, because the complainant, the Cattle Raisers Association, upon the promulgation of that report and opinion, made application to the Commission for more specific findings of fact, which application had not been decided or disposed of, but held under advisement by the Commission until the Act to Regulate Commerce was amended by what is known as the Hepburn law, effective August 28, 1906, and which application for more specific findings of fact was still pending before the Commission on August 29, 1906.

That on August 29, 1906, the complainant in behalf of itself and its members and others similarly situated who were engaged in the business of raising, buying and shipping cattle from the states of Texas, Oklahoma and New [fol. 282] Mexico and Colorado over said lines of railway. to the markets shown as points of destination in said Anpendix A hereinbefore referred to, filed in its petition with the Interstate Commerce Commission reaffirming its previous allegations of its petition filed with the Commission February 1, 1904, charging that the rates on cattle from the points hereinbefore mentioned to the destinations mentioned, and the advances in said rates, and the rates as advanced, were unjust and unreasonable, and praying that the Commission should proceed with such further hearing as it might deem necessary with respect to the allegations that the said rates were unjust and unreasonable, and for an order of the Interstate Commerce Commission prescribing the just and reasonable rates and praying for an order of reparation against the defendants respectively on behalf of the members of the Cattle Raisers Association of Texas. as shippers, and others similarly situated, for their respective damages accruing by reason of the payment of said unjust and unreasonable rates.

That thereupon the Interstate Commerce Commission, after answers duly filed by all the said defendants herein and their connecting carriers, proceeded to a full hearing of the matters contained in said petition, and after such full hearing as provided by law, the Interstate Commerce Commission on April 14, 1908, by its Report and Opinion, 13

I. C. C. 419, in said cause, found that said rates as advanced and the advances of said rates were unjust and unreasonable, as found in the previous opinion of the Commission as above referred to, reported in 11 I. C. C. 298, the finding of the Commission in its said report of April 14, 1908, being in part as follows:

"It is our opinion, therefore, that the advances shown in the appendix to our former report, which is referred to and made a part of this report, which were effected by the defendants during the year 1903, were unjust and unreasonable; that the present rates produced by those advances are unjust and unreasonable; that the rates in effect previous to said advance would be just and reasonable and ought not to be exceeded for the future."

The report and opinion of the Interstate Commerce Commission as shown by the official report in said cause, 13 I. C. C. 419, is here referred to and complainant asks that the same be taken as a part hereof. That in said report and opinion the Commission reserved for further consideration the matter of reparation when the specific claims thereafter should be presented.

[fol. 283] That the Commission, in its last named report, and by supplemental order in said cause, prescribed and fixed the reasonable rates for shipments of cattle from the points of origin named in said Appendix A hereinbefore referred to, to the destinations therein named, being the

same rates designated therein as "rate ordered," which became effective November 17, 1908.

#### V

That the said parties named as consignors in said Appendix A above referred to, being the owners thereof, shipped the carloads of cattle as therein shown, from the points to the destinations shown in said Appendix A and paid to defendants respectively the rate of freight named in the column marked "Rate paid," which rates as aforesaid were held by the Commission to be unjust, unreasonable and unlawful at the dates of said shipments, in the amounts as named in said Appendix A and that said owners as shippers and consignors were thereby damaged by defendants respectively in the amount of the unjust and unreasonable

part of the rates as shown by the difference between "Rate paid" and "Rate ordered," as shown in Appendix A.

The rate paid was as aforesaid found by the Commission to be unjust and unreasonable and the rate ordered was found to be the just and reasonable rate applicable to such shipment, when made.

### VI

And plaintiff alleges that the facts as found by the Commission in said reports and opinion are true and correct. That said shippers named in said Appendix as consignors, and E. B. Spiller, as secretary of the Cattle Raisers Association of Texas, and his predecessor in office, H. E. Cowley, in due time and in accordance with law, filed and caused to be filed with the Interstate Commerce Commission for and on account of the shippers named as consignors, and on account of said Spiller and Crowley as assignees for and on account of said shipments and freight paid, their petitions and claims for reparation for the amount of said unlawful charges which the Commission by its said report and order of January 12, 1914, Exhibit A hereto, directed the defendant to pay. That the said claims and the rights of the said owners as shippers and consignors as aforesaid were duly and legally assigned to E. B. Spiller, as shown in the report and order of the Commission, Exhibit A hereof, so that he [fol. 284] became and was, at the date of said order, and now is, the legal and equitable owner and holder thereof and entitled to have and recover the damages resulting to said shippers by reason of the premises, and as such was entitled to have the order of the Interstate [Com-erce] Commission as aforesaid ordering and directing the said carriers in said cause to pay said principal and interest, together with interest thereon, and is entitled to recover the same, together with interest and attorneys' fees provided by law.

That the said order of the Interstate Commerce Commission, Exhibit A hereof, directing the railroads therein named to pay the aforesaid damages as therein shown, was duly served upon each of the railway companies, defendants herein, but though often requested that said defendants have failed and refused and still fail and refuse to pay the same or any part thereof, and are therefore severally liable

to the plaintiff in the full amount of said damages, principal, interest and attorneys' fees.

### VII

Wherefore, premises considered, the plaintiff prays for citation in due form and on final hearing for judgment for the aforesaid damages, interest, costs and attorneys' fees, and in duty bound will ever pray.

## Second Count

And the plaintiff, E. B. Spiller, reaffirming and adopting the foreging allegations, and adopting Exhibit A thereto as Exhibit A to this court, and making reference to the said allegations and Exhibit as a part of this count of this petition, and complaining of the said defendants and for cause of action against them jointly and severally and suing for treble damages under the anti-trust laws of the United States, to-wit, 26 Statute- at Large 209-210, Act of July 2, 1890, and 28 Statute- at Large 570, further alleges:

The Missouri, Kansas & Texas Railway Company, the Missouri Pacific Railway Company, the St. Louis & San Francisco Railway Company, the Atchison. Topeka & Santa Fe Railway Company, the Chicago, Rosk Island & Pacific Railway Company, and the Chicago & Alton Railway Company, each of which own and operate their line of railway through the Western District of Missouri, and have principal operating offices in said District at Kansas City, Missouri; and the St. Louis, Iron Mountain & Southern Railway Company, the Chicago & East Illinois Railway Company, and the Illinois Central Railroad Company, which have offices and agents at Kansas City, Missouri; [fol. 285] and the Texas & Pacific Railway Company, which has its principal office and agents at Dallas, in Dallas County, Texas. That as hereinafter alleged, all of said parties were acting together in the combination and conspiracy herein alleged, in restraint of interstate commerce.

That on or about March 3, 1905, the aforesaid defendants in combination and conspiracy with each other and with their connecting carriers operating in connection with defendants and other railroads in the States of Texas,

Oklahoma, New Mexico and Colorado, hereinafter named, transporting cattle to the live stock markets at Kansas City, Missouri, St. Joseph, Missouri, Omaha, Nebraska, National Stock Yards Illinois, Chicago, Illinois and Orleans, Louisiana, as interstate commerce from the points named in Appendix A to the Supplemental Report of the Commission attached hereto as exhibit A, as points of origin, to the points named therein as points of destination of the shipments referred to, made, put into effect and maintained the unjust and unreasonable rates on cattle herein shown.

That in violation of law, to-wit: the defendants acting in combination and conspiracy with one another and with said connecting carriers, namely, the Gulf, Colorado and Santa Fe Railway Company, The Chicago, Rock Island and Gulf Railway Company, The Missouri, Kansas & Texas Railway Company of Texas, The St. Louis San Francisco and Texas Railway Company, The Fort Worth and Rio Grande Railway Company, The Fort Worth and Denver City Railway Company, The Colorado and Southern Railway Company, The Texas Central Railway Company, The Houston and Texas Central Railway Company, The International and Great Northern Railway Company, The Texas Midland Railway Company, The Galveston, Harrisburg and San Antonio Railway Company, The St. Louis, Southwestern Railway Company of Texas, The San Antonio and Aransas Pass Railway Company, The Wichita Valley Railway Company, and all other railroad companies operating at that time in Texas, Oklahoma, New Mexico and Colorado. engaged in the through transportation of cattle from said points of origin to said points of destination, parties defendant to said cause 732, before the Interstate Commerce Commission by their said acts, combination and conspiracy in violation of law, in restraint of interstate commerce as to the rates of freight on the shipments made as herein referred to, by the advances of the said rates, imposed upon all shippers, and particularly those mentioned as consignors in said Appendix A, said unreasonable rates, maintained [fol. 286] the same and charged said rates on the said shipments as shown in said Report and Order of the Commission hereto attached as Exhibit A.

That the combination and conspiracy consisted of the said defendant and their said connecting carriers, on or about

March 3, 1903, coming together by their representatives and my means of personal communications and by correspondence, to establish and publish freight rates on cattle and other live stock as well as on other commodities by joint tariffs of rates, to which all of said defendants were parties, and by tariffs issued by the individual lines from their own stations and individual lines and their connecting lines where two or more lines participated in such transportation and by the joint tariffs of all of said defendants; said rates applying from said points of origin named in said Appendix A aforesaid to the destinations therein named, and were the rates named in the column headed "rate paid."

That defendant and all of said carriers and the others in combination and conspiracy with each other put into effect said rates as joint and several rates and maintained them in restraint of interstate commerce in cattle, shipped from said points of origin to said destination, and by virtue of the said combination and conspiracy eliminated all competition in said rates, and advanced the same as found by the Interstate Commission in its said supplemental report and order, Exhibit A hereto, as shown by the difference in the "rate paid" and "rate advanced" as shown in said Appendix A, which advance was unjust, unreasonable and unlawful, and an unlawful restraint of interstate commerce, and were by combination and conspiracy contained in force

by defendant down to November 17, 1908.

That the parties named in said Appendix A made the shipments and paid said unlawful rates as therein shown and consequently were damaged in their business and property to the extent of the difference in said rates and the rates ordered as shown in said Appendix A, in the aggregate amount and interest as shown by the finding of the Commission aforesaid; and that said Consignors so damaged assigned their claims for damages to plaintiff as shown in said Supplemental Report and Order of the Commission attached hereto as Exhibit A, as a part hereof, so that plaintiff is entitled to all the rights of the said injured parties, and is therefore damaged by virtue of the premises in his business and property in said amounts for all of [fol. 287] which defendants are jointly and severally liable to plaintiff, and which said defendants have failed and refused and still refuse to pay.

That said parties so damaged were entitled to treble damages and that plaintiff as assignee is entitled to recover the same, jointly and severally, together with interest, costs and attorneys' fees.

The plaintiff, therefore, prays citation, and on final hearing for his aforesaid damages, interest and costs and for reasonable attorneys' fees, and for general relief.

> Cowan & Burney, Fort Worth, Texas; Deatherage & Creason, Kansas City, Mo., Attorneys for Plaintiff Cowan & Burney, Fort Worth, Texas; Deatherage & Creason, Kansas City, Mo., Attys. for Plff.

> > Fort Worth, Texas, Dec. 24, 1914.

STATE OF TEXAS,

County of Tarrant:

Before me, the undersigned authority, this day personally appeared E. B. Spiller plaintiff in the above cause who being by me duly sworn stated upon his oath that the allegations of the foregoing petition are true and correct.

E. B. Spiller,

Subscribed and sworn to before me this the 24 day of Dec., 1914. M. E. Grifiths, Notary Public, Tarrant Co. Tex. (Seal.)

The Master: Mr. Murphy, are you giving the dates of the filing of these respective papers as well as the exhibit itself?

Mr. Murphy: Yes, sir. I offer in evidence and ask that it be marked Exhibit 7 the petition filed by E. B. Spiller, et al., plaintiffs, vs. Missouri, Kansas & Texas Railway Company, et al., No. 4320, filed December 29, 1914, in the [fol. 288] District Court of the United States for the Western Division of the Western District of Missouri.

Said paper to be supplied as Exhibit 7 is in words and figures as follows to-wit:

"That said petition, Exhibit 7, is identical mutatis mutandis, with Exhibit 6, supra, except as to amounts and names, and covers the same period of time."

Mr. Murphy: I now offer in evidence copy of the judgment rendered August 16, 1916, by the District Court of the United States for the Western Division of the Western District of Missouri in the case of E. B. Spiller vs. the Missouri, Kansas & Texas Railway Company, et al., including the defendant herein, St. Louis and San Francisco Railroad Company, No. 4308, and ask that be marked Exhibit 8.

Mr. Miller: We object to that for all of the reasons stated

before.

Objection overruled.

To which ruling of the Master the defendant then and there duly excepted.

Said paper was marked Exhibit 8, and same is in words and figures as follows, to-wit:

(Exhibit 8 omitted here as same is identical with Ex. B attached to Intervening Petition of E. B. Spiller, hereinbefore set out.)

Mr. Murphy: I now offer in evidence judgment rendered on August 16, 1916, by the District Court of the United States for the Western Division of the Western District of Missouri in the case of E. B. Spiller, et al., vs. Missouri, Kansas & Texas Railway Company, et al., No. 4320, so far as it pertains to the St. Louis and San Francisco Railroad Company.

Mr. Miller: Same objection as last stated.

Said paper was marked Exhibit 9 and is in words and figures as follows, to-wit:

(Exhibit 9 omitted here as same is identical with Ex. B attached to Intervening Petition of E. B. Spiller, et al., hereinbefore set out.)

[fol. 289] Subject to objection, as to incompetency, counsel for defendant and St. Louis-San Francisco Railway Company, admitted that petition for writ of error was filed by the railroad company; that on the same date, August 28, 1916, petition for writ of error was filed over the signatures of W. F. Evans and Cowherd, Ingraham and Durham, attorneys for plaintiff in error (P. 16).

Subject to objections as to incompetency, counsel for the defendant and the St. Louis-San Francisco Railway Company, further admitted that on September 8, 1916, appeal bond was filed in 4308 in the penal sum of \$3,500,00, executed by the St. Louis & San Francisco Railroad Company, by Cowherd, Ingraham & Durham, Attorneys, as principals, and by the United States Fidelity & Guaranty Company, as surety.

Which objections as to incompetency were by the Special Master overruled; to which rulings of the Special Master, defendant, by counsel, then and there duly excepted, and still excepts (p. 17).

The Master: I am letting all of this in on the theory that it gives a history of the case and as bearing upon the diligence of the petitioners.

Mr. Murphy: I might state to the Master that it is also offered in connection with our claim for attorneys' fees, taxed as costs.

The Master: Yes, it gives a history of the proceding.

Subject to the same objection as to incompetency, and with the further statement that the St. Louis & San Francisco Railroad Company appeared specially for the purpose of the motion and for no other purpose, counsel for the defendant, and the St. Louis & San Francisco Railroad Company further admitted, for the purpose of the record, that on November 1, 1915, the St. Louis & San Francisco Railroad Company filed a motion to quash the summons and return and to dismiss the cause as to the defendant, St. Louis & San Francisco Railroad Company, in cause No. 4308, in the District Court of the United States, for the Western Division of the Western District of Missouri.

Which objection as to incompetency was by the Special Master overruled; to which ruling of the Special Master, [fol. 290] defendant by counsel, then and there duly excepted, and still excepts (P. 17).

Counsel for interveners then offered in evidence, the motion to quash, filed November 1, 1915, to show that said motion question- the service upon an agent of the receiver,—failed to get service upon an agent of the receiver, and got service upon the railroad company. Said motion to quash was then read into the record, and it is in words and figures as follows, to-wit:

### EXHIBIT IN EVIDENCE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI

#### No. 4308

E. B. SPILLER, Plaintiff,

VS.

Missouri, Kansas & Texas Railway Company et al.,
Defendants

Special appearance and motion of defendant St. Louis and San Francisco Railroad Company to quash the summons and return and to dismiss this cause as to this defendant

Now comes the St. Louis and San Francisco Railroad Company, appearing specially for the purpose of this motion and for no other purpose whatever, and moves this court to quash the summons and the return thereon and to dismiss this cause as to this defendant for the following reasons:

First, Said summons was improvidently issued.

Second. Said summons is illegal and void.

Third. The person named in the summons is not the same as the person served.

Fourth. Said St. Louis and San Francisco Railroad Company is a corporation organized under the laws of the State of Missouri, having its principal office in St. Louis, in the Eastern Division of the Eastern District of Missouri. At the time of the service of said summons said company was not and is not now doing business in the Western District of Missouri and is not an inhabitant thereof. Plaintiff in this cause is a citizen and resident of the State of Texas.

Wherefore this defendant asks that its motion be sustained.

St. Louis and San Francisco Railroad Company, Appearing Specially by Cowherd, Ingraham & Durham, Attorneys for Defendant.

[fol. 291] At this point, counsel for the defendant and the St. Louis-San Francisco Railway Company, admitted for the purposes of the record, that on December 7, 1915, the defendant, St. Louis & San Francisco Railroad Company, filed its Answer in case No. 4308, E. B. Spiller vs. Missouri, Kansas & Texas Railway Company, et al; and also filed its Answer in case No. 4320, E. B. Spiller, et al. vs. Missouri, Kansas & Texas Railway Company, et al., in the District Court for the Western District of Missouri, Cowherd, Ingraham, Durham & Morse appearing as attorneys for the railroad Company.

Mr. Murphy: I now offer in evidence the mandate and judgment of the United States Circuit Court of Appeals rendered in the case of E. B. Spiller vs. Missouri, Kansas & Texas Railway Company, et al., including the St. Louis and San Francisco Railroad Company, in cause No. 4308. The original opinion in that case was handed down on October 29, 1917, afterwards a motion for relearing was filed by the defendant in error, E. B. Spiller, and in March 11, 1918 the original judgment was modified and mandate was filed March 27, 1918.

Mr. Miller: Objected to for the reasons stated in our previous objections.

Objection overruled.

To which ruling of the Master the defendant then and there duly excepted.

Said paper was marked Exhibit 10, and same is in words and figures as follows, to-wit:

(Ex. 10 omitted here as same is identical with Ex. C. attached to Intervening Petition of E. B. Spiller, hereinbefore set out.)

Subject to the same objection, and reserving the right to introduce any testimony in opposition if necessary, counsel further admitted the fact that it was stipulated between the attorneys for E. B. Spiller, et al., and the attorneys for the railroad company, that appeal need not be taken in 4320 but that judgment in 4320 would abide the result of the appeal in 4308.

Which objection as to the incompetency was by the Special Master overruled; to which ruling of the Special [fol. 292] Master, defendant, by counsel, then and there duly excepted and still excepts (P. 20).

Mr. Murphy: I now offer in evidence the judgment and mandate of the Supreme Court of the United States in the case of E. B. Spiller vs. St. Louis and San Francisco Railroad Company in case No. 4308, mandate having been filed June 6, 1920, in the office of the Clerk of the District Court for the Western Division of the Western District of Missouri.

Said paper was marked Exhibit 11, and the same is in words and figures as follows, to-wit:

(Ex. 11 omitted here as same is identical with Ex. D attached to intervening petition of E. B. Spiller hereinbefore set out.)

Mr. Murphy: I now offer in evidence petition and motion of E. B. Spiller in cause 4308 in the District Court of the United States for the Western Division of the Western District of Missouri for an additional allowance of attorneys' fees to be taxed as costs against the Atchison, Topeka & Santa Fe Railway Company, et al., including the St. Louis and San Francisco Railroad Company.

Mr. Miller: What is the date?

Mr. Murphy: It is not dated, but it was filed in July, 1920.

Mr. Miller: That is objected to for the reason heretofore offered, and for the further reason that the receivers, as shown by the record in this case, were discharged January 29, 1918, and because the St. Louis-San Francisco Railway Company entered into the possession and operation of the property of the St. Louis and San Francisco Railroad Company on November 1, 1918.

Objection overruled.

To which ruling of the Master the defendant then and there duly excepted.

Said paper was marked Exhibit 12, and is in words and figures as follows, to-wit:

[fol. 293]

Ехнівіт 12

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI

No. 4308

E. B. SPILLER, Plaintiff,

VS.

Atchison, Topeka & Santa Fe Railway Company, Missouri, Kansas & Texas Railway Company, Missouri Pacific Railway Company, St. Louis & San Francisco Railroad Company, Chicago, Rock Island & Pacific Railroad Co., Chicago & Alton Railroad Company, St. Louis, Iron Mountain & Southern Railway Co., Chicago & Eastern Illinois Railroad Company, Illinois Central Railroad Company, Defendants

Motion for an order to allow plaintiff's attorneys additional fees for services in the United States Circuit Court of Appeals and in the Supreme Court of the United States and to tax the same as a part of the costs

Now comes the plaintiff in the above entitled cause and shows to the court that by Sec. 16 of the Act to Regulate Commerce, of February 4, 1887, Chapter 104 24th Stat., 379, as amended, it is expressly provided that: "If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit." That upon the hearing of this case before this court, this court allowed petitioner an attorney's fee of ten per cent of the amount of the judgment rendered by this court for the services of your petitioner's attorneys in the trial of this case before the court up to that time.

Plaintiff further shows to the court that the defendants herein each sued out separate writs of error from this court to the United States Circut Court of Appeals for the Eighth Circuit, where it was necessary for the plaintiff in error to make voluminous briefs and to argue said cases in said

court: that thereafter said Circuit Court of Appeals rendered an opinion overruling the decision of this Court, and your petitioner thereupon filed his petition for rehearing in said Circuit Court of Appeals and made a brief in support thereof, which petition for rehearing was overruled; that your petitioner applied to the Supreme Court of the United States for writs of error and also for writs of certiorari to the Circuit Court of Appeals, which writs of certiorari were granted and it became necessary and your petitioner's [fol. 294] attorney did in fact appear before the United States Supreme Court and argue said writs of error and certiorari and also made briefs in support, both of the said writs of error and said writs of certiorari, with the result that said writs of certiorari were granted and the judgment and decision of the Court of Appeals of the Eighth Circuit were reversed and the judgment of this court was affirmed. and the cases have been remanded here by the United States Supreme Court.

Wherefore, the premises considered, the plaintiff moves the court to make an order allowing such additional sum for the services of plaintiff's attorneys in the United States Circuit Court of Appeals and in the United States Supreme Court as the court may deem reasonable, such additional sum to be taxed and collected as a part of the costs of the suit.

----, Attorneys for Plaintiff.

Filed Aug. 15, 1923. Jas. J. O'Connor, Clerk.

Mr. Murphy: I now offer in evidence judgment of the District Court of the United States for the Western Division of the Western District of Missouri in the case of E. B. Spiller vs. Missouri, Kansas & Texas Railway Company, et al., including the St. Louis and San Francisco Railroad Company, No. 4308, covering the motion and petition of E. B. Spiller for an allowance of additional attorneys fees to be taxed as costs. I haven't the date of that, but my understanding is it was July 20, 1920. If that is not correct, I will substitute the correct date.

Same objection and same ruling.

To which ruling of the Master the defendant then and there duly excepted.

Said paper was marked Exhibit 13, and the same is in words and figures as follows, to wit:

(Ex. 13 omitted here as same is identical with Ex. F attached to intervening petition of E. B. Spiller, hereinbefore set out.)

Mr. Murphy: I now offer in evidence copy of the notice served upon the St. Louis-San Francisco Railway Company December 2, 1920, that the intervener, E. B. Spiller, would [fol. 295] file his petition to be allowed to intervene in consolidated cause final No. 4174 on the 23rd of December, 1920. That is in cause No. 4308.

Same objection and same ruling.

To which ruling of the Master the defendant then and there duly excepted.

Said paper was marked Exhibit 14 and is in words and figures as follows, to-wit:

### Ex. 14-11-29-21

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EAST-ERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI, EIGHTH JUDICIAL CIRCUIT

# No. 4174. In Equity

NORTH AMERICAN COMPANY, Complainant,

Ve.

St. Louis & San Francisco Railroad Company, Defendant

# No. 4174. In Equity

NORTH AMERICAN COMPANY, Complainant,

VS.

St. Louis & San Francisco Railroad Company, Defendant

No. 4290. In Equity

JOINT RAIL COMPANY, Complainant,

VS.

St. Louis & San Francisco Railroad Company, Defendant

# No. 4304. In Equity

Bankers Trust Company and Neill A. McMillan, as Trustees, Complainants,

VS.

St. Louis & San Francisco Railroad Company, Defendant

No. 4334. In Equity

GUARANTY TRUST COMPANY, Complainant,

VS.

St. Louis & San Francisco Railroad Company, Bankers Trust Company, and Neil A. McMillan, as Trustees, Defendants

Consolidated Cause Final

Notice to Defendant of Filing of Petition of E. B. Spiller for Leave to Intervene

To the St. Louis & San Francisco Railway Company, the purchaser of the property sold under the final decree and order of the court in the above-entitled cases:

You will please take notice that, E. B. Spiller, having made demand upon you for the payment of his claim founded upon the judgment against the St. Louis & San Francisco [fol. 296] Railroad Company by the United States District Court for the Western Division of the Western District of Missouri, and which judgment the said E. B. Spiller claims is prior in lien and superior in equity to the refunding mortgage and the general lien mortgage upon the property purchased by you under said final decree, and which payment you have failed and declined to make, will present to the United States District Court for the Eastern Division of the Eastern District of Missouri, Eighth Judicial Circuit, his petition to be allowed to intervene in said cause and to have his said claim adjudged to be prior in lien and superior in equity to said refunding mortgages and general lien mortgages and to have such claim enforced against the property sold to you as purchaser under said final decree, in accordance with the usual practice of said court in relation to payments of similar character, and that said petition will be duly presented to said court, at the court room of said court, in the City of St. Louis, Missouri, on the 23rd day of December, 1920, at ten o'clock A. M. or as soon thereafter as counsel can be heard, copy hereto attached.

S. H. Cowan, B. F. Deatherage, Attorneys for Intervener.

Filed Aug. 15, 1923. Jas. J. O'Connor, Clerk.

Mr. Murphy: May it be stipulated, Mr. Miller, that a similar notice was served in cause No. 4320 in the District Court of the United States for the Western Division of the Western District of Missouri, entitled E. B. Spiller, et al. vs. M. K. & T. Railway Company, et al., including the defendant in this cause? You will notice that one of them is filed in 4320 and one in 4308. In 4320 there is an additional plaintiff over 4308.

Mr. Miller: Well, you are offering them as notices filed in those cases. They are not notices filed in those cases.

Mr. Murphy: No, they are filed against the railroad company in the case of the claims mentioned in those cases.

Mr. Miller: These notices here refer to cases against the Railroad Company.

Mr. Murphy: And the fact that they are claimed to be a prior lien and superior in equity to the refunding mortgage and the general lien mortgage upon the property purchased by the Railway Company under the final decree.

[fol. 297] Mr. Miller: You are offering the notice itself in evidence?

Mr. Murphy: Yes.

Mr. Miller: We make the same objection to it.

Objection overruled.

To which ruling of the Master the defendant then and there duly excepted.

Mr. Murphy: I now offer in evidence the order of Judge Sanborn made and filed May 27, 1913, in the District Court of the United States for the Eastern Division of the Eastern District of Missouri in the cause of the North American Company, complainant, vs. St. Louis and San Francisco Railroad Company. I will read the part that I desire par-

ticularly to call the Master's attention to (Reading). "They (referring to the receivers appointed in the order) are authorized and directed to collect all moneys due and all moneys to become due to said Company, to institute and prosecute such suits in their own names as Receivers or in the name of the Company, as their attorney may advise, to defend such suits as may be brought against them and those now pending or hereafter brought against the Company which affect or may affect the property of which they now are or may become Receivers."

Mr. Miller: We object to that testimony for the same

reason.

Objection overruled.

To which ruling of the Master the defendant then and there duly excepted.

Said paper was marked Exhibit 15, and is in words and figures as follows, to-wit:

### Ехнівіт 15

Filed August 15, 1923. Jas. J. O'Connor, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES WITHIN AND FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI

NORTH AMERICAN COMPANY, Complainant,

VS.

St. Louis, & San Francisco Railroad Company, Defendant

Order Granting Leave for Appointment of Receiver

On reading and considering the verified bill of complaint in this cause and on motion of counsel for the complainant, [fol. 298] and the defendant, the St. Louis and San Francisco Railroad Company appearing by its counsel and assenting thereto and upon due deliberation, It is ordered, adjudged and decree as follows:

(1) That the said bill and answer be filed and the prayer of the bill for the appointment of a receiver or receivers in this cause be and the same is hereby granted.

- (2) That Thomas H. West and Benjamin L. Winchell be and they are hereby appointed Receivers and invested with the powers of receivers in equity of all the franchises, liens. claims, rights, interests and property of every name and nature, either at law or in equity and wherever situated of the St. Louis and San Francisco Railroad Company, and they are hereby authorized and directed forthwith to take possession thereof, to preserve, manage, operate and use the same, to run and operate the railroads now held by said Company by lease or otherwise and to conduct the business of said Company according to law and in accordance with the principles, rules and practice in equity in cases of this character. They are authorized to apply to any other court or courts in this Circuit or any other Circuit for ancillary orders to assist them in the exercise of their powers and the discharge of their duties. They are authorized and directed to collect all moneys due and all moneys to become due to said Company, to institute and prosecute such suits in their own names as Receivers or in the name of the Company, as their attorney may advise, to defend such suits as may be brought against them and those now pending or hereafter brought against the Company which affect or may affect the property of which they now are or may become Receivers. They are also authorized with the advice of their attorney to compromise and settle the amounts owing from one party to the other in suits between them and third parties and between the company and third parties in ordinary cases arising out of the common operation of the Railroad.
- (3) Out of the moneys coming to their hands they are authorized to pay, (1) the necessary expenses of operating the railroads and conducting the business during their receivership; (2) the taxes on the property; (3) the following claims incurred within six months preceding the date of this order, the wages and salaries of employes of the Company, the traffic and car mileage balances and accounts for car and equipment repairs.

[fol. 299] (4) It is hereby ordered that all persons, firms and corporations in possession of any of the property of which the Receivers are hereby appointed forthwith deliver the same to them or to their representatives or agents.

- (5) The Railroad Company and the officers, directors, agents, attorneys and employes thereof, and all other persons claiming to act by virtue of or under said Railroad Company, and all other persons, firms and corporations whatsoever and wheresoever situated, located or domiciled, are hereby restrained and enjoined from interfering with, attaching, levying upon or in any manner whatsoever disturbing any portion of the properties and premises of which Receivers are hereby appointed, or from taking possession of or in any manner interfering with the same or any part thereof, or from interfering in any manner or preventing the discharge by said Receivers of their duties or the operation of said properties and the premises under the order of this Court.
- (6) The Receivers shall keep accurate accounts of their receipts and disbursements, take proper vouchers for their disbursements and file with the special master complete bimonthly reports of their receipts and disbursements with the accompanying vouchers. They shall file with him an inventory of the properties coming into their possession as soon as they can conveniently prepare it.
- (7) Within ten days from this date each of the said Receivers shall execute a bond with one or more sureties approved by this Court or one of the Judges thereof, in the sum of \$100,000 for the benefit of whom it may concern, conditioned that they will well and truly perform the duties of their officers and account for all moneys and properties which may come to their hands and abide by and perform all things which they shall be directed by the Court to do and shall file this bond with the clerk of this Court.
- (8) The complainant herein as well as the Receivers may apply to any other Court of competent jurisdiction for such order or orders in the premises as it may deem necessary in aid of the orders issued by this Court.

Walter H. Sanborn, Circuit Judge.

Filed May 27th, 1913. W. W. Nall, Clerk.

[fol. 300] At this point a recess was taken until 2 p. m., at which time the hearing was resumed as follows:

Mr. Murphy: I am offering stipulation of facts signed by the interveners and by the defendant and the St. Louis-San Francisco Railway Company, subject to the objections which I will make to particular facts as I proceed, on the ground of relevancy and materiality.

The Master: Is that all the testimony you will put in?

Mr. Murphy: Yes.

The Master: Just give it to me and I will read it, unless you have some point you want to call my attention to.

Mr. Murphy: Well, I will just note my objections. We object to the following in paragraph two found on page two of the stipulation; "and during each of said years during said period expended large sums of money in current expenses incurred in the ordinary operation of its line of railroad," for the reason that said fact is wholly immaterial and does not prove or tend to prove any issue in this case And we object to the following beginning on the last line of page two in the second paragraph: "and during each year within said period said Receivers paid large sums of money incurred as current expenses for the operation of the lines of railroad of defendant during said receivership," for the same reason. And we object to the following in paragraph two on page three of the stipulation: "That said moneys so collected by defendant were deposited in banks with other moneys of defendant in defendant's general account, and said banks had no instructions from defendant to keep said moneys in a specific fund, nor to refrain from paying same out in the ordinary course of business on defendant's checks against its fund in said banks, nor did said banks keep said money in a separate account, and that defendant checked out of its deposits in each of said banks during each year from June 1st, 1906, to May 27th, 1913, sums of money largely in excess of said alleged overcharges and deposited in said banks during each of said years sums of money largely in excess of said overcharges," for the same reason as assigned in the first objection-that is, that the facts recited in the portion of the stipulation quoted are wholly irrelevant and immaterial, do not prove or tend to prove any issues in the case.

Mr. Miller: We object to all of paragraph No. 1 of the stipulation for the reasons contained in our answer as to [fol. 301] why the claims should not be filed or considered. We object to that portion of paragraph No. 2 from the beginning of the paragraph down to and including the word "indebtedness" in the seventh line of the paragraph for

the same reason, because it is immaterial to any of the issues. We object to the following language beginning in line ten of paragraph two with the words "that during each of said years" and ending with the word "interest" in the fifth line from the bottom of page two, for the same reason. We object to that portion of paragraph two beginning with the words "that during the period" in the fifth line from the bottom of page two and ending with the word "indebtedness" in the last line of that page, for the same reason. We object to that portion of paragraph two on page three beginning with the words "that upon the appointment" in the sixth line from the bottom of the paragraph and concluding with the word "dollars" at the end of the paragraph, for the same reason.

The Master: The stipulation will be received in evidence

subject to the objections.

Said stipulation is in words and figures as follows, towit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EAST-ERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MIS-SOURI

# In Equity No. 4174

NORTH AMERICAN COMPANY, Complainant,

VS.

St. Louis & San Francisco Railroad Company, Defendant

In the Matter of the Intervening Petition and Supplemental Intervening Petition of E. B. Spiller, et al. Intervening Petition No. 402.

In the Matter of the Intervening Petition and Supplemental Intervening Petition of E. B. Spiller. Intervening Petition No. 403

### Consolidated Cause Final

### STIPULATION OF FACTS

It is hereby stipulated between the above named interveners, St. Louis and San Francisco Railroad Company and St. Louis-San Francisco Railway Company parties

herein, that the following facts are agreed upon and shall be considered in evidence without further proof thereof, subject, however, to objection as to materiality, competency and relevancy:

[fol. 302] I

That on May 27th, 1913, the above entitled cause was instituted by North American Company, a corporation, as complainant, filing in this court a general creditor's bill against defendant; that receivers were on said date anpointed as prayed for in said general creditor's bill; that on April 3rd, 1914, Rail Joint Company, a corporation, filed in this court its general creditor's bill against said defendant; that on May 22nd, 1914, Bankers Trust Company and Neill A. McMillan, as trustees under a general lien mortgage of defendant, filed in this court their complaint against defendant for the foreclosure of said general lien mortgage; that on July 9th, 1914, Guaranty Trust Company, Trustee in defendant's refunding mortgage, filed their complaint in this court for the foreclosure of said mortgage; that on January 6th, 1915, said Bankers Trust Company and Neill A. McMillen as Trustee, filed their amended and supplemental bill herein praying for the foreclosure of said general lien mortgage; that each of said bills requested the appointment of receivers for the property of defendant, and that receivers were appointed under said bill of said North American Company as aforesaid and all orders appointing receivers under said bill were adopted as appointments of receivers under each subsequent bill, and all of said causes were duly consolidated into the Consolidated Cause Final above styled; that on May 29th, 1914, an interlocutory decree was rendered impounding the property of defendant for the payment of its debts and obligations.

H

That the gross receipts of defendant during each year from June 1st, 1906, to May 27th, 1913, exceeded defendant's operating expenses during each such year in an amount in excess of interveners' claims, including interest thereon; that during each of said years within said period defendant expended large sums of money in making im-

provements to its lines f railroad and equipment and in paving interest on its bonded indebtedness, and during each of said years during said period expended large sums of money in current expenses incurred in the ordinary operation of its lines of railroad; that during each of said years within said period defendant at all times had in cash on hand an amount of money in excess of said claims of interveners with interest thereon; that during the period of the receivership of the property of defendant, to-wit; May 27th, 1913, to Janu-[fol. 303] ary 29th, 1918, the gross operating receipts of said receivership during each of said years within said period were in excess of the operating expenses of said receivership, such excess amounting during each of said years to more than the total of the claims of interveners herein with interest; that during the period of said receivership. said receivers paid out under orders of said court large sums of money for improvements and betterments to the property and equipment of defendant, and large sums of money to bondholders of defendant by way of interest on its bonded indebtedness; and during each year within said period said receivers paid large sums of money incurred as current expenses for the operation of the lines of railroad of defendant during said receivership; that the alleged overcharges constituting interveners' demands were not kept by defendant in a separate or designated account or fund. nor where they separated from other gross receipts of defendant derived from the operation of its lines of railroad; that said moneys so collected by defendant were deposited in banks with other moneys of defendant in defendant's general account and said banks had no instructions from defendant to keep said moneys in a specific fund nor to refrain from paying same out in the ordinary course of business on defendant's checks against its funds in said banks. nor did said banks keep said moneys in a separate account. and that defendant checked out of it-deposits in each of said banks during each year from June 1st, 1906, to May 27th, 1913, sums of money largely in excess of said alleged overcharges, and deposited in said banks during each of said years sums of money largely in excess of said alleged overcharges; that upon the appointment of said receivers, defendant turned over to said receivers and said receivers

received from defendant in cash the sum of approximately Three Hundred Thirty-Four Thousand Dollars (\$334,000), The term "large sums of money," as used in this paragraph II means at least several hundred thousand dollars.

#### III

That any of the parties hereto may introduce in evidence without authentication printed copies of such of the orders, reports and decrees entered or filed in the above entitled cause as such party may desire and may also offer in evidence without authentication or certification such of the pleadings, orders, motions and judgments in the cause instituted by interveners against defendant on January 11th, 1915, in this Court involving the same claims presented by these interventions and similar papers from the suit filed [fol. 304] by interveners in the Federal Court at Kansas City, Missouri, involving said alleged overcharges, as such party may desire.

#### IV

It is further stipulated that either party at any hearing on the above intervening petitions, may object on the ground of irrelevancy, immateriality or incompetency to any of the facts agreed upon in this stipulation and to the introduction of any of the documents or court proceedings herein referred to, but no objection shall be made on the ground that said documents or court proceedings are not originals, certified copies or properly authenticated.

#### V

Any party to this proceeding shall have the right to introduce such additional competent evidence as it may desire to offer at any hearing on the above intervening petitions.

#### VI

It is agreed that neither defendant nor said St. Louis-San Francisco Railway Company shall be held to have waived by virtue of this stipulation any of its defenses or pleas in bar to the filing of hearing of said intervening petitions as set forth and contained in their respective answers

thereto filed herein, but all said defenses and pleas in bar, and each of them, are hereby expressly reserved notwithstanding the execution of this stipulation.

Dated at St. Louis, Missouri, this 29th day of November,

1921.

(Signed) E. B. Spiller et al. and E. B. Spiller, by S. H. Cowan, D. A. Murphy, John S. Leahy, Walter H. Saunders, Their Solicitors. St. Louis and San Francisco Railroad Company and St. Louis-San Francisco Railway Company, by W. F. Evans, E. T. Miller, Their Solicitors.

[fol. 305] Mr. Murphy: I am not exactly clear on the effect your Honor is going to give to Judge Sanborn's order. I want to expedite the matter as much as possible, but

I don't want to waive any objections.

The Master: I have been thinking about that. It would seem from the evidence you have put into this record that you were not guilty of laches, that you pushed the affairs along as fast as you could upon which that order seems to have been based. I don't believe that order is res adjudicata, but that the whole matter ought to be gone into.

Mr. Murphy: I don't want to be held to have waived the binding effect of that order and my contention of the binding effect in the offer of proof along the lines that your

Honor has suggested as to diligence, and so forth.

The Master: Well, I don't think I would hold that. I don't know what I will hold. I shall take that into consideration in connection with the evidence in this case in making my finding and report after all the evidence is in.

Mr. Murphy: So that our position may be stated positively in the record, we believe that Judge Sanborn's order is final and settled and not waived by the pleas in bar.

The Master: My present impression would be that if you put in evidence here to justify me in finding one way or the other that you were not bound by that final decree, that I would have to find against you. In other words, from my present viewpoint, I can't see that his order opening up this matter is res adjudicata. That is my present impression, although I have no preconceived ideas of the finding in this case.

Mr. Murphy: May it be admitted, Mr. Miller, that prior to the order confirming the sale, and on or about the 28th or 29th of August, 1916, the interveners notified the reorganization managers and the receivers and attorneys for the defendant railroad company that they had recovered judgments and adjudications in the District Court of the United States at Kansas City, and that the railroad company had appealed from those judgments and that interveners expected to enforce the claims evidenced by those judgments as preferred claims, prior in equity and superior in right to the claims of all mortgagees?

[fol. 306] Mr. Miller: I will state that copies of the notice to Henry W. Taft, attorney for Reorganization Committe- and the St. Louis-San Francisco Railway Company, and others, were served on W. F. Evans on August 30.

1916.

Mr. Murphy: Isn't that August 29th?

Mr. Miller: Served on August 30. The original of the notice was served on the 29th of August, 1916, upon Henry W. Taft, W. F. Evans and others. That is the notice that you evidently referred to. I don't care whether it is the 30th or 29th, but that was the copy of notice that was served on Mr. Evans. Now, as to the others, the facts will probably show what your notice calls for. Of course, I can't admit it. I don't know a thing about it.

E. T. Miller, counsel for the defendant and the St. Louis-San Francisco Railway Company, upon examination by counsel for interveners, testified as follows:

Direct examination.

By Mr. Murphy:

Witness testified that W. F. Evans was General Solicitor for the Receivers; that he was either General Solicitor or General Counsel for the railroad company prior to the receivership, that he occupied both positions at certain times, that Mr. Evans was not with the company during federal control, (p. 28) which began December 27, 1917; that the general solicitor has charge of all legal matters affecting the property of the Company, and the general at-

torney worked under the general solicitor. Generally speaking, it was true that after the appointment of the receivers in May, 1913, and up until the time of the reorganization, the attorneys representing the Company and appearing in litigation against the railroad company, were attorneys employed by the receivers and compensated by them; the receivers continued the former legal representation in litigation pending or brought against the railroad company and the receivers, and paid salaries to them; attorneys handling suits against the old railroad company, though, did not get additional compensation, but there may have been some exceptions. Generally speaking, it is true that what is stated about continuing the same legal force during the pendency of the receivership applies also to the local attorneys who appeared for the railroad company during the pendency of the receivership; local attorneys change from time to time.

[fol. 307] Cowherd, Ingraham, Durham & Morse, of Kansas City, were the District Attorneys for the railroad company for some time prior to the receivership; he does not recall now without looking it up, whether Cowherd, Ingraham, Durham & Morse of Kansas City, became the District Attorneys for the receivers, or whether the present District Attorneys, Guthrie & Conrad occupied the position; Guthrie & Conrad is the same general firm, Cowherd and Ingraham being dead, and Mr. Durham being the only one

left of that firm.

At this point the defendant and the St. Louis-San Francisco Railway Company, by Mr. Miller, admitted, subject to objection, that suit was filed on July 13, 1914, by the intervener, E. B. Spiller and the intervener E. B. Spiller, et al., in the District Court of the United States, for the Northern District of Texas, at Fort Worth, Texas, against various defendants, one of the defendants being the St. Louis & San Francisco Railroad Company, and W. B. Biddle, W. C. Nixon, and J. W. Lusk, receivers thereof, the cause of action being practically identical with that stated in the petition filed in the case in the District Court of Kansas City in which the judgments were rendered (p. 30).

The defendant and the St. Louis-San Francisco Railway Company, by Mr. Miller, admitted that on November 2, 1914, in said case of E. B. Spiller and E. B. Spiller, et al., against the St. Louis-San Francisco Railroad, W. B. Biddle, W. C. Nixon, and J. W. Lusk, receivers thereof, et al., the said receivers of the St. Louis & San Francisco Railroad Company, through their attorneys, W. F. Evans, Thomas H. Bond, Andrews, Streetman, Burns & Logue, and Lockett & Rose, appeared in the District Court of the United States at Fort Worth, and on November 2, 1914, a plea in abatement signed by the Attorneys named was filed, (p. 30).

Mr. Miller: We ask that it be introduced in evidence, in connection with the admission, subject to our general objection.

Mr. Murphy: I offer the plea in abatement in evidence.
Mr. Miller: We make the general objection to that, heretofore stated.

The Master: It will be received subject to the objection.

To which ruling of the Master, the defendant by counsel duly excepted and still except, (P. 31).

Said paper was marked "Exhibit 16," and same is in words and figures as follows, to-wit:

[fol. 308]

Ехнівіт 16

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, AT FORT WORTH

No. 704

E. B. SPILLER, Plaintiff,

VS.

Missouri, Kansas & Texas Railway Company et al., Defendants

Plea in Abatement of James W. Lusk, W. B. Biddle, and W. C. Nixon, as Receivers of St. Louis & San Francisco Railroad Company, Named as Defendants in the Above-entitled Cause.

Now comes James W. Lusk, W. B. Biddle and W. C. Nixon, as Receivers of St. Louis & Receivers of St. Louis & San Francisco Railroad Company, and appearing herein for the purpose of filing this plea in abatement, and for no other purpose, say:

1. That on May 27, 1913, by order of the United States District Court for the Eastern Division of the Eastern District of Missouri at St. Louis duly entered in Cause No. 4174. Equity, on the docket of said Court, styled North American Company, Complainant, vs. St. Louis & San Francisco Railroad Company, Defendant, Thomas H. West and Benjamin L. Winchell were duly appointed Receivers of all franchises, liens, claims, rights, interests and property of every name and nature of the St. Louis & San Francisco Railroad Company, and did duly qualify as such; and thereafter by order duly entered by said Court in said Cause, to-wit, on July 3, 1913, the resignation of Benjamin L. Winchell as receiver as aforesaid, was accepted to take effect on July 14, 1913, and W. C. Nixon and W. B. Biddle were duly appointed co-receivers with the aforesaid Thomas H. West, such appointment to take effect July 14, 1913, upon which date said W. C. Nixon and W. B. Biddle duly became and were co-receivers with the said Thomas H. West; and thereafter, by order duly entered in said court, to-wit, on December 8, 1913, the resignation of the aforesaid Thomas H. West was accepted and James W. Lusk duly appointed in his stead as co-receiver with the aforesaid W. C. Nixon and W. B. Biddle.

That it appears from the allegations of plaintiff's complaint filed in this cause that his cause of action herein is based upon transactions of St. Louis & San Francisco Rail-[fol. 309] road Company occurring and transpiring long prior to May 27, 1913, and long prior to the appointment of Receivers of said St. Louis & San Francisco Railroad Company, as hereinbefore set out, and that the liability sought to be enforced herein, insofar as pertains to these defendants accrued and became fixed long prior to the appointment of Receivers of said St. Louis & Sau Francisco Railroad Company, and is in truth and in fact a liability (if any at all) of St. Louis & San Francisco Railroad Company and not of Receivers; and that these defendants cannot, in any event, be held or become liable or bound for the payment or satisfaction of such liability as is sought to be enforced against them herein unless and except as may be directed by an order of the aforesaid United States District Court for the Eastern Division of the Eastern District of Missouri in the aforesaid cause No. 4174, Equity,

upon intervention properly presented and prosecuted in said cause,

That it does not appear from the allegations of plaintiff's complaint herein, nor from any of the papers in this Cause, that the plaintiff has been granted leave of the said District Court of the United States for the Eastern Division of the Eastern District of Missouri to sue the said James W. Lusk, W. B. Biddle and W. C. Nixon as Receivers as aforesaid, or to make them parties to this cause; and the said James W. Lusk, W. B. Biddle and W. C. Nixon say that in truth and in fact plaintiff has not obtained leave of the said United States District Court for the Eastern Division of the Eastern District of Missouri to sue said Receivers, or to

make them parties to this cause.

Wherefore, these defendants say that they are in no way proper parties to this cause, and especially that they cannot lawfully be made parties to this cause, and cannot be sued herein unless and until plaintiff first obtain leave of the said United States District Court for the Eastern Division of the Eastern District of Missouri to sue said Receivers, or to make them parties to this cause, for the reason that, as above alleged, plaintiff's cause of action, if any he has, accrued against the St. Louis & San Francisco Railroad Company (and not the Receivers thereof) prior to May 27, 1913, the date of the appointment of Receivers of the said St. Louis & San Francisco Railroad as aforesaid.

[fol. 310] Wherefore, these defendants pray that this cause be as to them abated and dismissed, and that they be adjudged to go hence without a day and with their costs.

(Signed) W. F. Evans, Thos. H. Bond, Andrews, Streetman, Burns & Loyne, Larken & Rowe, Attorneys for James W. Lusk, W. B. Biddle, and W. C. Nixon, Receivers St. Louis & San Francisco Railroad.

STATE OF TEXAS, County of Tarrant:

Before me, the undersigned authority, on this day personally appeared J. L. Lockett, Jr., who being by me duly sworn, says, that he is one of the attorneys for James W. Lusk, W. B. Biddle and W. C. Nixon, and as such attorney authorized to make this affidavit; that he has read the fore-

going Plea in Abatement and that the matters of fact therein set forth are true and correct, as he verily believes. (Signed) J. L. Lockett.

Sworn to and subscribed before me this 2nd day of November, A. D. 1914. (Signed) Finnye L. Williams, Notary Public in and for Tarrant County, Texas.

At this point the defendant and the St. Louis-San Francisco Railway Company admitted, subject to the same objection, that on November 2, 1914, W. F. Evans, Andrews, Streetman, Burns & Logue, and Lockett and Rose, filed an answer in that case in the District Court at Fort Worth, Texas, for the St. Louis & San Francisco Railroad Company.

The Master: That will be received, subject to the objection.

To which ruling of the Master, the defendant by counsel

duly excepted and still excepts.

The defendant and the St. Louis-San Francisco Railway Company, by Mr. Miller, further admitted that a writ of error was prosecuted in the name of the defendant, St. Ifol. 3111 Louis & San Francisco Railroad Company, from the judgment of the District Court for the Western Division of the Western District of Missouri, to the Circuit Court of Appeals of the Eight Circuit, and that the attorneys who appeared were attorneys for the receivers, and received their whole compensation from the receivers at that time. On November 1, 1916, the new company, the St. Louis & San Francisco Railway Company, took over the property of the old company, and from that date has operated the said properties up to the present time, except during the period of Federal control. The record will show who the attorneys who appeared in the prosecution of the writs of error in the Circuit Court of Appeals, were the attorneys for; the railway company paid them from November 1, 1916. That is true so far as the activities of the attorneys for the St. Louis-San Francisco Railway Company, through the Circuit Court of Appeals and through the Supreme Court. (P. 32.)

The case which was appealed by the railroad company from the District Court of the United States for the Western Division of the Western District of Missouri, was appealed, according to the record, on August 28, 1916. At that time the attorneys who were employed and paid by the

receivers were handling the litigation. (P. 33.)

The case in the Circuit Court of Appeals was not decided until 1918. From November 1, 1916, until the decision of the Circuit Court of Appeals in 1918, the attorneys employed and paid by the St. Louis-San Francisco Railway Company, handled the litigation. That is also true of the activities of the defendant railway company in the Supreme Court of the United States, on the appeal of the interveners from the judgment of the Circuit Court of Appeals to the Supreme Court, except during the period of Federal control. (P. 33.)

During the period of Federal control, Mr. Evans was in the employ of the railroad administration.

Mr. Murphy: I want to offer in evidence the reorganization plan of the St. Louis and San Francisco Railroad Company.

Mr. Miller: The same general objection is made to that, and I object further to that unless the purpose of the offer is disclosed, because it is incompetent to any of the issues. I don't know what their object is in offering that. I would

like to know.

[fol. 312] Mr. Murphy: Well, I have two objects in mind. It goes to the question of the court's order in allowing the interventions to be filed and heard. The evidence shows conclusively that in allowing this as a preferred claim no other creditor of the St. Louis and San Francisco Railroad Company can be injured or in any way affected, and that no party to any of the proceedings can claim to be legally injured or affected by the allowance of this claim as a preferred claim. That is one of the objects. The other object goes to the general consideration and the equities involved in our claim.

Mr. Miller: We object for the further reason that it is not a preferred claim under the final decree in this case. The final decision settled all those questions. If it is offered

for the purpose of discrediting the final decree, or the contract made thereby with the purchasers of the property, it is res adjudicata, therefore the purpose for which it is offered cannot be material here because foreclosed by the decree in this case.

The Master: Objection will be overruled. I am letting in all of this testimony so that the court when it gets my report will have all the evidence and facts before it.

To which ruling of the Master the defendant then and there duly excepted.

Said paper was marked Exhibit 17, same being in words and figures as follows, to-wit:

Filed Aug. 15, 1923. Jas. J. O'Connor, Clerk

Reorganization of St. Louis and San Francisco Railroad Company

Plan and Agreement, Dated November 1, 1915

Reorganization managers: J. & W. Seligman & Co., Speyer & Co.

Depositaries: Central Trust Company of New York, Mississippi Valley Trust Company, St. Louis; Berliner Handels-Gesellschaft, Berlin; Associate: Cassa, Amsterdam, for refunding mortgage bonds; Bankers Trust Comfol. 3131 pany, New York, for General Lien 15-20 Year Gold Bonds; Guaranty Trust Company of New York, for Stock; Central Trust Company of New York, for other securities embraced in Plan.

Reorganization of St. Louis and San Francisco Railroad Company

The undersigned have been for a long time engaged in an examination of the affairs of the St. Louis and San Francisco Railroad System, and the relative value and earning capacity of its various lines, with a view of formulating a Plan of Reorganization which would fairly recognize the rights of the security-holders. Much time and attention have been devoted to acquiring knowledge as to details, and a careful expert examination of the Company's operations and physical condition, and of its financial requirements, has been made by Mr. J. W. Kendrick. The following plan for the reorganization of the System has been formulated which it, is expected will accomplish, among other things, the following results:

- (a) Reduction of the fixed charges to a limit believed to be safely within the net earnings capacity of the reorganized property;
- (b) Adequate capital provision for present and future requirements;
- (c) Payment or adjustment of all debts, guaranties, etc., and provision for existing equipment trust obligations;
- (d) The preservation of the parts of the System deemed advantageous, and such control for the reorganized property as shall safeguard the rights of security holders.

Having these objects in view, the annexed Plan has been prepared, and Messrs. J. & W. Seligman & Co. and Speyer [fol. 314] & Co. have undertaken to act as Reorganization Managers to carry out the plan.

New York, February 21, 1916.

Frederick Strauss, James N. Wallace, Alexander J. Hemphill, Edwin G. Merrill, Harry Bronner, C. W. Cox, Breckenridge Jones, Committee representing holders of St. Louis and San Francisco Railroad Company refunding mortgage bonds deposited under the agreement dated June 20, 1914. Spever & Co., representing holders of St. Louis and San Francisco Railroad Company General Lien 15-20 year five per cent bonds deposited under the agreement dated May 28, 1913. L. C. Krauthoff, representing office National des Valeurs Mobilieres, Paris, and le Comite de Defense des porteurs français d'obligations St. Louis and San Francisco Railroad Company general lien five per cent gold bonds, French series, and as attorneyin-fact for depositing holders of such bonds.

Plan and Agreement for the Reorganization of St. Louis and San Francisco Railroad Company

Bonds, Trust Certificates and Stock Which May Be Deposited under the Plan and Agreement on the Terms Stated in the Plan.

[fol. 315] St. Louis and San Francisco Railroad Company, Refunding Mortgage Four Per Cent Gold Bonds.

Depositaries: Central Trust Company of New York, Mississippi Valley Trust Company, St. Louis; Berliner Handels-Gesellschaft, Berlin; Associatie, Cassa, Amsterdam.

St. Louis and San Francisco Railroad Company, General Lien 15-20 Year Five Per Cent Gold Bonds.

Depositary: Bankers Trust Company, New York.

St. Louis San Francisco Railroad Company, Consolidated Mortgage Four Per Cent Gold Bonds.

St. Louis and San Francisco Railroad Company, Southwestern Division First Mortgage Five Per Cent Gold Bonds.

St. Louis and San Francisco Railroad Company, Central Division First Mortgage Four Per Cent Gold Bonds.

St. Louis and San Francisco Railroad Company, Northwestern Division First Mortgage Four Per Cent Gold Bonds.

St. Louis and San Francisco Railway Company, Trust Mortgage Five Per Cent Gold bonds of 1887.

St. Louis and San Francisco Railway Company, Trust

Mortgage Six Per Cent Gold Bonds of 1880.

St. Louis and San Francisco Railway Company, Missouri and Western Division First Mortgage Six Per Cent Gold Bonds.

St. Louis, Wichita and Western Railway Company, First

Mortgage Six Per Cent Gold Bonds.

St. Louis and San Francisco Railroad Company, Kansas City, Fort Scott and Memphis Railway Company Guaranteed Four Per Cent Preferred Stock Trust Certificates.

Muskogee City Bridge Company, First Mortgage Five Per Cent Gold Bonds.

St. Louis, Memphis and Southeastern Railroad Company, First Mortgage Four Per Cent Gold Bonds.

Chester, Perryville & Ste. Genevieve Railway Company, First Mortgage Five Per Cent Gold Bonds. [fol. 316] Pemiscot Railroad Company, First Mortgage Six Per Cent Gold Bonds.

Kennett & Osceola Railroad Company, First Mortgage Six Per Cent Gold Bonds.

Southern Missouri and Arkansas Railway Company, First Mortgage Five Per Cent Gold Bonds.

Fort Worth and Rio Grande Railway Company, First Mortgage Four Per Cent Gold Bonds.

Quanah Acme and Pacific Railway Company, First Mortgage Six Per Cent Gold Bonds.

Depositary: Central Trust Company of New York.

St. Louis and San Francisco Railroad Company, First Preferred Stock.

St. Louis and San Francisco Railroad Company, Second Preferred Stock.

St. Louis and San Francisco Railroad Company, Common Stock.

Depositary: Guaranty Trust Company of New York.

All bonds and trust certificates deposited must be in negotiable form and all stock certificates and registered bonds deposited must be either endorsed in blank for transfer or accompanied by proper transfers in blank duly executed. The Refunding Mortgage Four Per Cent Gold Bonds must bear the coupon maturing July 1, 1914, and all subsequent coupons; the General Lien 15-20 Year Five Per Cent Gold Bonds must bear the coupon maturing May 1, 1914, and all subsequent coupons; other bonds must bear all coupons maturing after July 1, 1916. All references in the Plan and in the accompanying Agreement to said bonds, shall unless the context otherwise requires, be deemed to include also the respective coupons stated. All securities and all certificates of stock must bear proper stamps for transfer in New York.

Other Bonds and Notes and Claims Dealt with in the Reorganization

St. Louis and San Francisco Railroad Company, New Orleans, Texas and Mexico Division First Mortgage Gold Bonds.

[fol. 317] St. Louis and San Francisco Railroad Company, Two Year Five Per Cent. Secured Gold Notes. St. Louis and San Francisco Railroad Company, Two

Year Six Per Cent Secured Gold Notes.

St. Louis and San Francisco Railroad Company, Trust Certificates for Preferred Stock, Chicago and Eastern Illinois Railroad Company for Common Stock, Chicago and Eastern Illinois Railroad Company.

Ozark & Cherokee Central Railway Company First Mort-

geg- Five Per Cent Gold Bonds.

### Other Debt, Secured and Unsecured

# Securities Undisturbed in the Reorganization

St. Louis and San Francisco Railway Company, General Mortgage Five Per Cent. and Six Per Cent. Gold Bonds, Due 1931.

St. Louis and San Francisco Railroad Company, All Equipment Trust Obligations maturing after July 1, 1917.

Kansas City, Fort Scott and Memphis Railway Company System, All Bonds.

# Conditions of Participation

This Plan and Agreement has been prepared and adopted by the Committee constituted under the agreement dated June 20, 1914, of Holders of Four Per Cent. Gold Bonds of St. Louis and San Francisco Railroad Company, issued under the Refunding Mortgage, dated June 20, 1901, and a copy of this Plant and Agreement has been, or will be, lodged with each of the Depositaries under said agreement of June 20, 1914. Notice of the fact of the approval and adoption will be given in accordance with the provisions of said agreement. Every holder of a certificate of deposit under said agreement of June 20, 1914, who shall not exercise, the right of withdrawal conferred by said agreement within the period therein limited, shall be conclusively and finally deemed for all purposes to have irrevocably waived the right of withdrawal given by said agreement, and this Plan and Agreement shall be binding on all holders of certificates of deposit who shall not so withdraw their deposited bonds. The rights of such holders of certificates of deposit, however, shall be such only as are conferred by this Plan and Agreement and shall be subject to compliance [fol. 318] with such terms as this Plan and Agreement may impose as conditions of participation in the benefits hereof. Holders of certificates of deposit not so exercising such right of withdrawal will be entitled to the benefits of this Plan and Agreement without the issue of new certificates.

Holders of Refunding Mortgage Bonds not heretofore deposited under the agreement of June 20, 1914, may, on or before April 3, 1916, deposit with some one of the Depositaries under said agreement their said bonds with the coupon maturing July 1, 1914, and subsequent coupons attached, and shall receive therefor certificates of deposit of

such Depositary issued under that agreement.

This Plan and Agreement has been prepared and adopted by Speyer & Co. acting uno r the agreement dated May 28. 1913, between Speyer & Co. and Holders of General Lien 15-20 Year Five Per Cent, Gold Bonds of St. Louis and San Francisco Railroad Company, and a copy of this Plan and Agreement with their written adoption and approval thereof has been, or will be lodged by Speyer & Co. with the Depositary under said agreement of May 28, 1913. Notice of the fact of such adoption and approval and of the lodging of a copy thereof with said Depositary will be given in accordance with the provisions of said agreement of May 28, 1913. All holders of certificates of deposit under said agreement of May 28, 1913, who shall not exercise the right of withdrawal conferred by said agreement within the period therein limited, shall be deemed to have assented to this Plan and Agreement and shall be bound thereby without further act or notice, but, notwithstanding the rights of such holders of certificates of deposit shall be only such as are conferred by this Plan and Agreement and shall be subject to compliance with such terms as this Plan and Agreement may impose as conditions of participation in the benefits hereof. Holders of certificates of deposit not so exercising such right of withdrawal will be entitled to the benefits of this Plan and Agreement without the issue of new certificates.

Holder of General Lien 15-20 Year Five Per Cent. Gold Bonds not heretofore deposited under the agreement of May 28, 1913, may, on or before April 3, 1916, deposit with the Depositary under said agreement of May 28, 1913, their said bonds with the coupon maturing May 1, 1914, and subsequent coupons attached, and shall receive therefor certificates of deposit of said Depositary issued under that agreement.

This Plan and Agreement has been prepared [fol. 319] and adopted by the Comité de Défense of French Holders of General Lien 15-20 Year Five Per Cent. Gold Bonds of St. Louis and San Francisco Railroad Company, French Series, and by the Office National des Valeurs Mobilières. Paris, under whose direction and auspices said Comité de Defense was established, and a large number of said holders (1) have executed a power of attorney in the form annexed to and made a part of the Instrument of Designation executed by L. C. Krauthoff, Esq., the Attorney-in-fact of said holders, dated August 5, 1915, of the Bankers Trust Company as Depositary for such bonds, and (2) have made deposit of said bonds subject to such respective powers of attorney with said Depositary. The written assent of said Attorney-in-fact to this Plan and Agreement filed with said Depositary and the written direction of said Attorney-infact to said Depositary to hold the bonds and coupons at any time received by said Depositary subject to this Plan and Agreement and to the order of the Reorganization Managers for the purposes of carrying the Plan and Agreement into effect, shall operate as the assent to this Plan and Agreement by all holders of certificates of deposit at any time issued by said Depositary, or by any of its agents, including The Equitable Trust Company of New York (Paris Branch), and then outstanding, and all such holders shall be bound by such assent so expressed without further act The rights of such holders of certificates, however, shall be such only as are conferred by this Plan and Agreement and shall be subject to compliance with such terms as this Plan and Agreement may impose as conditions of participation in the benefits hereof. Holders of such certificates of deposit shall be entitled to the benefits of this Plan and Agreement without the issue of new certificates. At the request of the Reorganization Managers said Depositary shall stamp all powers of attorney deposited with it so as to indicate that such holders have assented to this Plan and Agreement.

Holders of General Liens 15-20 Year Five Per Cent. Gold Bond, French Series, may, on or before April 3, 1916, deposit with said Depositary, or one of its agents, their said bonds with the coupon maturing May 1, 1914, and subsequent coupons attached, accompanied by a properly executed power-of-attorney to said Attorney-in-fact, in substantially said form, and shall receive therefor certificates of deposit of said Depositary issued pursuant and subject [fol. 320] to the powers conferred by said power-of-attorney, and stamped as assenting to this Plan and Agreement.

Pursuant to the arrangement with the Purchase Syndicate hereinafter stated, holders of First Preferred, Second Preferred and Common Stock of St. Louis and San Francisco Railroad Company, comply with the terms and conditions of this Plan and Agreement, may, to the extent hereinafter stated, purchase from the Purchase Syndicate new Prior Lien Mortgage Five Per Cent. Gold Bonds and new Common stock (trust certificates) at the price and on the terms hereinafter prescribed. Holders of said stocks in order to become entitled to the benefits of the Plan and to obtain such right of purchase, must deposit their said stock with Guaranty Trust Company of New York, the Depositary for that purpose, on or before April 3, 1916, and at the time of such deposit must pay to said Depositary the sum of \$5 for each share deposited. Certificates of deposit of said Depositary will be issued for all stock so deposited and in repect of which payment shall be so made.

Holders of other securities called for deposit under the Plan must, on or before April 3, 1916, deposit their securities with all coupons maturing after July 1, 1916, with Central Trust Company of New York, the Depositary for that purpose, and shall receive therefor certificates of deposit of said Depositary in form approved by the Reorganization

Managers.

No estimate, statement, explanation, or suggestion contained in the Plan or the accompanying Agreement or in any circular issued or which may hereafter be issued by the Refunding Mortgage Bondholders' Committee, or by Speyer & Co. as Representatives of the General Lien Mortgage Bondholders, or by the Comité de Défense of French Holders of General Lien 15-20 Year Five Per Cent. Gold Bonds, French Series, or by the Office National des Valeurs

Mobilières, Paris, or by their Representative, or by the Reorganization Managers, or by any of the Depositaries or by any one else, is intended or is to be accepted as a warranty or as a condition of deposit or assent under the Plan or the accompanying Agreement and no defect or error shall release any deposit under the Plan and the accompanying Agreement or affect or release any assent thereto or affect or release any payment made or action taken pursuant thereto except by written consent of the Reorganization Managers.

[fol. 321] The securities and moneys deposited and paid ander the Plan or by the terms hereof becoming subject to the Plan, will be held by the respective Depositaries subject to the order and control of the Reorganization Managers as provided in the Reorganization Agreement.

All securities deposited under the Plan or otherwise becoming subject to the Plan are to be kept alive so long as deemed necessary by the Reorganization Managers for the purposes of reorganization or the protection of the New Company or its security holders. Unless the context shall otherwise require, the term securities whereever used in this Plan and in the accompanying Agreement shall be deemed to include stocks.

# New Railroad Company

It is contemplated that the various properties will be sold under foreclosure of the Refunding Mortgage or the General Lien Mortgage or both mortgages or under the general creditors' bill or otherwise dealt with, and a successor company or companies will be organized wherever the Reorganization Managers in their discretion may determine. term New Company wherever used in this Plan or in the accompanying Agreement is intended to mean such company as the Reorganization Managers may determine to utilize for the purposes of the Plan. In case delay should occur in acquiring any of the mortgaged lines of railroad embraced in the Plan, the execution of the Plan will not necessarily be postponed for that reason but the existing bonds upon such lines deposited under the Plan may be pledged under the Prior Lien Mortgage as security for the bonds issued thereunder and, subject thereto, first

under the Adjustment Mortgage and then under the Income Mortgage, until such lines of railroad shall be acquired by the New Company and subjected in like order

of priority to the liens of said mortgages.

It is contemplated that as a consideration for the property and securities to be conveyed and delivered to the New Company, or which it shall acquire pursuant to the Plan, it shall deliver its bonds and stock, excepting such final amounts thereof as shall be reserved for the future use

of the New Company.

If, however, the Reorganization Managers shall, in carrying out the Plan, acquire for the purposes of the reorganiza-[fol. 322] tion, all the outstanding stock and First Mortgage Six Per Cent. Gold Bonds of New Mexico and Arizona Land Company, it is intended that such Land Company, or its properties or its stock and securities so acquired, shall be recapitalized or capitalized at \$1,000,000 common stock, authorized and issued, and that on the completion of the reorganization \$500,000 par amount of such recapitalized Land Company stock be distributed among outstanding holders of certificates of deposit for deposited stock of St. Louis and San Francisco Railroad Company of all classes in proportion to the par amount of deposited stock represented by the respective certificates of deposit (see page 22).

New Bonds and Stocks

All bonds will be payable in gold coin of the United States of America and both as to principal and interest will be payable so far as permitted by law, without deduction for Federal, State and Municipal taxes in the United States; and provision may be made that, if so determined, the principal or interest or both of any of the bonds may be made payable (1) in the City of New York only or (2) in said city and also in one or more American cities or foreign cities or countries or (3) only in one or more foreign cities or countries; and also in case any bonds of any series shall be payable as to principal or interest, or both, in any foreign country or countries, such bonds may be made payable in the currency or the respective currencies there current, at fixed rates of exchange, and may contain appropriate provisions as may be requisite or expedient to conform to the requirements of law or of

commercial usage in the foreign country or countries in which they may be made payable including provisions requiring the payment of the principal or interest thereof without deduction for taxes; and the bonds of any series may be expressed also in one or more foreign language or languages, the English language, however, to govern in the construction thereof.

It is intended, as far as deemed advisable, to vest directly in the New Company, the lines of railroad of companies the stocks of which are owned by the existing company and which may be acquired in the reorganization, so that the new Prior Lien Mortgage, Adjustment Mortgage and Income Mortgage may be made as far as deemed by the Reorganization Managers practicable direct liens in their relative order of priority. The form and terms of the respective mortgages and of the bonds to be issued under them shall, in all respects not expressly determined by the [fol. 32]. Plan, be such as shall be approved by the Reorganization Managers.

The New Company is to authorize the following securities:

### Prior Lien Mortgage Gold Bonds

The Prior Lien Mortgage Bonds will be limited to the total authorized amount of \$250,000,000 at any one time outstanding. They will bear interest, payable semi-annually, at such rate not exceeding six per cent, per annum as may from time to time be determined by the board of directors at the time of issue and stated in the bonds, and are to be secured by mortgage and deed of trust to Central Trust Company of New York and some individual as Trustees, which it is intended shall embrace all or substantially all the lines of railroad, franchises and equipment, terminals and other property (including stocks and bonds), except as otherwise dealt with under the Plan, acquired by the New Company pursuant to the Plan and also all additional property of every character (including stock and bonds) at any time thereafter acquired by the New Company. They may be issued in separate series maturing on the same or different dates and any series may be made redeemable in whole or in part, at time, on notice and at premiums as may be determined at the time of issue and stated in the bonds of such series. Under the Prior Lien Mortgage the New Company will reserve the right to retire any series in whole or in part and to issue for such purposes and under such restrictions as may be prescribed in that behalf in said mortgage, the like aggregate principal amount of bonds in another series or in other series, bearing the same or different rates of interest as the series retired and with such maturity or maturities as the board of directors may determine.

The Prior Lien Mortgage Bonds are to be issued, or are to be reserved for issue under the Prior Lien Mortgage.

for the following purposes:

In partial exchange for existing securities	
embraced in the Plan	\$93,398,500
Sold to Purchase Syndicate	25,000,000
For the corporate purposes of the New Com-	
Pagamad to puting 45 200 000 F	6,811,500
Reserved to retire \$5,306,000 Equipment Trust Certificates maturing after July 1,	
1917.	5,306,000
Reserved to retire \$9,484,000 St. Louis and	
San Fancisco Railway Company General	
Mortgage 5% and 6% Bonds due 1931, un-	
disturbed	9,484,000
Reserved for issue after January 1, 1917, at	
par, for new equipment	32,500,000
[fol. 324] Issuable prior to Jan-	
uary 1, 1922, for entire cost	
at the rate of \$2,000,000 an-	
nually, cumulative until Jan-	
uary 1, 1922 \$10,000,000	
Issuable after January 1, 1922,	
for two-thirds of cost at the	
cumulative rate of \$4,000,000	
biennially 22,500,000	
Paramed for increase	
Reserved for issue after	
January 1, 1917, at	
par, for improvements and betterments and	
for additions other	
than new mileage con-	
	20 500 000
structed or acquired	32,500,000

Issuable prior to January 1, 1922, for entire cost at the rate of \$3,000,000 annually, cumulative until January 1, 1922

15,000,000

Issuable after January 1, 1922, for two-thirds of cost at the cumulative rate of \$4,000,000 biennially

17,500,000

Any of the bonds reserved for equipment which may not have been issued for that purpose are to be also available for issue after January 1, 1933 for improvements and betterments and for additions other than new mileage constructed or acquired and may be issued for two thirds of cost at the cumulative rate, for all bonds issuable for such respective purposes, of \$4,000,000, biennially.

Reserved for issue at par to meet the cost of construction of new mileage or of the acquisition of other lines of railroad stocks or bonds representative thereof

45,000,000

Any of the bonds reserved to meet the cost of construction of new mileage or acquisition of existing lines, which may not have been issued for that purpose prior to January 1, 1931, are to be also available for issue thereafter for equipment or for improvements, betterments and additions, and may be issued for two thirds of cost at the cumulative rate for all bonds issuable for such respective purposes, of \$4,000,000 biennially.

Of the Prior Lien Mortgage Bonds there are to be presently issued and delivered under the Plan:

\$93,398,500 Series A, Four Per Cent, maturing July 1, 1950, redeemable at par and accrued interest.

\$31,811,500 Series B, Five Per Cent, maturing July 1, 1950, redeemable at 105 and accrued interest.

The Series A Bonds will be applied in partial exchange for existing securities.

The Series B Bonds will be applied as follows:

Sold to Purchase Syndicate	\$25,000,000
pany	6,811,500
	\$31,811,500

The Prior Lien Mortgage Bonds, Series A, provided to be presently issued and delivered under the Plan in partial exchange for existing securities, so far as not used in such exchange are to be reserved for such purpose under restrictions to be fixed by the Reorganization Managers, but [fol. 325] if in the judgment of the Reorganization Managers it will facilitate the carrying out of the Plan to provide cash for the purposes for which such bonds might otherwise be reserved, they may sell such bonds in whole or in part and may cause the bonds so to be sold to be issued as Series B Bonds, Five Per Cent.

# Cumulative Adjustment Mortgage Gold Bonds

The Adjustment Mortgage Bonds will be limited to the total authorized amount \$75,000,000 at any one time outstanding. They are to be secured by mortgage and deed of trust to Bankers Trust Company and some individual as Trustees, on the properties embraced in the Prior Lien Mortgage and from time to time becoming subject thereto. The Adjustment Mortgage will be subject to the Prior Lien Mortgage and to the prior payment out of the mortgaged property of all bonds at any time issued and outstanding under the Prior Lien Mortgage. The Adjustment Mortgage Bonds are to bear interest, payable annually or semi-annually as may be provided in the Adjustment Mortgage, at such rate not exceeding six per cent per annum as may from time to time be determined by the board of directors

at the time of issue and stated in the bonds but payable, prior to the maturity of the principal, only out of the Available Net Income of the New Company as hereinafter stated (see page 13) and as shall be defined in the Adjustment Mortgage. The New Company, however, will not be required in any year to pay interest except in amounts of one-quarter of one per cent or some multiple thereof, but any fractional amount not so distributed shall be carried forward into the next interest period. The interest on the Adjustment Mortgage Bonds will be cumulative but accumulations of interest shall not bear interest (see page 13). At the maturity of the principal, all arrears of interest shall be payable. The Adjustment Mortgage Bonds may be issued in separate series, maturing on the same or different dates, and any series may be made, in whole or in part, redeemable at the election of the New Company at times, on notice and at premiums as may be determined at the time of issue and stated in the bonds of such series but in all cases with accrued interest. Under the Adjustment Mortgage the New Company will reserve the right to retire any series in whole or in part and to issue for such purposes and under such restrictions as may be prescribed in that behalf in said mortgage, the like aggregate principal amount of bonds in another series or in other series, bearing the same or different rates of interest as the series re-[fol. 326] tired and with such maturity or maturities as the board of directors may determine.

The Adjustment Mortgage Bonds are to be issued, or are to be reserved for issue under the Adjustment Mortgage,

for the following purposes:

 Reserved to be issued at par after January 1, 1932, at the cumulative rate of \$3,000,000 annually for that part of the cost of improvements and betterments and for additions other than new mileage constructed or acquired, in respect of which Prior Lien Mortgage Bonds shall not be issued.

14,452,182

Any bonds reserved for any of the aforesaid purposes which shall not have been issued for the purpose for which they shall be reserved are to be available for issue after January 1, 1932, also for any other of said purposes in addition to the bonds specifically reserved therefor and under the like restrictions.

\$75,000,000

Of the Adjustment Mortgage Bonds, \$40,547,818, Series A, Six Per Cent., carrying interest from July 1, 1915, maturing July 1, 1955, and redeemable at par and accrued interest, are presently to be issued and delivered under the Plan and to be applied in partial exchange for existing securities.

## Income Mortgage Gold Bonds

The Income Mortgage Bonds will be limited to the total authorized amount of \$75,000,000 at any one time outstanding. They are to be secured by mortgage and deed of trust to Union Trust Company of New York and some individual as Trustees on the properties embraced in the Prior Lien Mortgage, and from time to time becoming subject thereto. The Income Mortgage will be subject to the Prior Lien Mortgage and to the Adjustment Mortgage and to the prior payment out of the mortgaged property of all bonds at any time issued and outstanding under the Prior Lien Mortgage, and of all bonds at any time issued and outstanding under the Adjustment Mortgage. The Income Mortgage Bonds are to bear interest, payable annually or semi-annually as may be provided in the Income Mortgage. at such rate not exceeding six per cent. per annum as may [fol. 327] from time to time be determined by the board of directors at the time of issue and stated in the bonds but payable only out of the Available Net Income of the New

Company as hereinafter stated (see page 13) and as shall he defined in the Income Mortgage, but only after the payment therefrom of all interest on the Adjustment Mortgage Bonds. The New Company, however, will not be required to pay interest except in amounts of one-quarter of one per cent. or some multiple thereof, but any fractional amount not so distributed will be carried forward into the next interest period. The interest on the Income Mortgage Bonds will not be cumulative. The Income Mortgage Bonds may be issued in separate series maturing on the same or different dates and any series may be made in whole or in part redeemable at the election of the New Company at times, on notice and at premiums as may be determined by the board of directors at time of issue and stated in the bonds of such series. Under the Income Mortgage the New Company will reserve the right to retire any series in whole or in part and to issue for such purposes and under such restrictions as may be prescribed in that behalf in said mortgage, the like aggregate principal amount of bonds in another series or in other series, bearing the same or different rates of interest as the series retired and with such maturity or maturities as the Board of Directors may determine.

The Income Mortgage Bonds are to be issued, or are to be reserved for issue under the Income Mortgage, for the following purposes:

To be issued in partial exchange for existing securities embraced in the Plan and for adjustment of Outstanding Indebtedness, bonds not used or required to be reserved for that purpose to be available for the corporate purposes of the New Company. \$35,192,000

Reserved for issue at par after January 1, 1922. at the cumulative rate of \$2,000,000 annually for improvements, betterments and additions and equipment.

20,000,000

Reserved for issue at par after January 1, 1932, at the cumulative rate of \$3,000,000 annually for improvements, betterments and additions and for equipment.....

19,808,000

[fol. 328] Of the Income Mortgage Bonds \$35,192,000, Series A, Six Per Cent., ranking for interest from July 1, 1915, maturing July 1, 1960, redeemable at par, and interest for proportionate part of current interest period, are presently to be issued and delivered under the Plan and to be applied in partial exchange for existing securities and for adjustment of Outstanding Indebtedness.

### Preferred Stock

The Preferred Stock will be entitled to receive for any fiscal year dividends at such rate not exceeding Seven Per Cent. per annum and no more as may be from time to time determined by the board of directors at the time of issue thereof and stated in the certificates therefor but such dividends will not be Cumulative. Subject further as hereinafter stated (see page 13), no dividend shall be declared or paid on the Common Stock for any fiscal year until full dividends have been paid or set aside on the Preferred Stock for such fiscal year and no dividend shall be paid on the Preferred Stock for any fiscal year other than out of the net income for such fiscal year applicable to the payment of dividends, unless for the two fiscal years next preceding, the full interest shall have been paid on the outstanding Income Mortgage Bonds. The Preferred Stock may be issued in series and any series may be made in whole or in part redeemable at the election of the Company on such terms, on such notice and at such premiums as the board of directors may determine at the time of issue and be stated in the certificates of such series.

The Preferred Stock will be applied as follows:

For adjustment of Outstanding Indebtedness (to be issued as Six Per Cent. Stock, and to be redeemable, if allowed by law, at par and proportionate dividend for current dividend period), any stock not so used to be available for the corporate purposes of the New Company

\$7,000,000

Reserved for future issue for corporate purposes, not exceeding

193,000,000

The Common Stock will be applied as follow:

For sale to Purchase Syndicate	\$43,180,000
For adjustment of Outstanding Indebtedness, any stock not so used to be available for the	
corporate purposes of the New Company	5,300,000
Reserved for future issue for corporate pur-	
poses, not exceeding	201,520,000

\$250,000,000

The Reorganization Managers may, in the course of the reorganization, procure the issue of securities or stock of the New Company for any of the purposes for which such securities or stock would otherwise be reserved pursuant to the Plan, and under like restrictions.

So far as the reorganization or the issue of securities or stock under the Plan may be subject to the approval or authorization of any public utilities or public service commission in any state in which any part of the property is situated or in which the Reorganization Managers may in their discretion determine to organize the New Company, or of any other commission having authority in the premises, the amount of capitalization to be issued in the reorganization may be reduced by such amount as the Reorganization Managers may in their discretion determine, in order to comply with the order of, or to obtain the authorization or approval of, any such commission. In the event of such reduction of capitalization, the whole of such reduction shall be made in Common Stock and in the amount of stock trust certificates to be sold to the Purchase Syndicate and by it in turn offered to depositing stockholders of the three classes: the amounts of stock trust certificates deliverable, respectively, under the three classes of Purchase Warrants and Fully Paid Subscription Certificates being reduced by an equal percentage.

Income Available for Contingent Interest Charge

The net income for any fiscal year as that term is defined in the accounting rules of the Interstate Commerce Commission from time to time in force, but without de-

duction in ascertaining net income, (1) for income transferred to other companies for capital purposes and (2) for interest on the Adjustment Mortgage Bonds and the In-[fol. 330] come Mortgage Bonds, shall be applicable to the payment of interest on the Adjustment Mortgage Bonds. and thereafter to the payment of interest on the Income Mortgage Bonds. The board of directors may first reserve therefrom such amount, within the limits hereinafter stated, as the board may in its discretion determine and the remainder shall constitute the Available Net Income for such year and shall, so far as necessary for the purpose, be applied to the payment of interest as aforesaid. For the purposes of determining the net income and the Available Net Income of the New Company for any fiscal year, which or any part of which may elapse before the mortgaged lines of railroad embraced in the Plan shall have been delivered to the New Company, the gross income of the receivers for such period shall be deemed gross income of the New Company for such period and shall be subject only to such deductions as would have been made if the mortgaged lines of railroad had been owned and operated by the New Company for such period and the new securities presently to be issued and delivered under the Plan had been issued and delivered July 1, 1915.

No amount shall be so reserved from the net income for any of the five fiscal years beginning with the establishment of the Voting Trust. The amount which may be so reserved in any fiscal year thereafter shall not exceed fifteen per cent. of the net income of the New Company for such fiscal year without deduction as aforesaid, nor in any event, \$660,000. The amounts so reserved and at any time unpaid shall not exceed, exclusive of interest, \$2,000,000 in the aggregate. No reservation from net income shall be made except during a period of ten years from and including the earliest fiscal year out of the net income for which, reservation shall be so made.

To the extent to which such reservation shall result in withholding from the Adjustment Mortgage Bonds any part of the full interest on the Adjustment Mortgage Bonds, the amount so withheld shall be carried to a fund to be designated Adjustment Mortgage Reserve Fund, and to

the extent to which such deduction shall result also in with-

holding from the Income Mortgage Bonds payment of any part of the full interest on the Income Mortgage Bonds, the amount so withheld shall be carried to an account to be designated Income Mortgage Reserve Fund. From time to time, as any arrears of interest on the Adjustment Mortgage Bonds shall be paid out of subsequent Available Net Income an amount equal to so much of the arrears so paid as would otherwise be applicable to the payment of interest on the Income Mortgage Bonds for such year and is withheld therefrom, shall be transferred from the Ad-[fol. 331] justment Mortgage Reserve Fund to the Income Mortgage Reserve Fund. The amounts carried to such Funds shall respectively constitute and be carried as corporate liabilities in the corporate accounts and shall carry interest at the rate of five per cent, per annum with semiannual rests (see page 10). The Income Mortgage Reserve Fund shall be distributable solely to the Income Mortgage Bonds but no such distribution shall be made at a time when interest on the Adjustment Mortgage Bonds shall be in arrears. Subject as aforesaid, the Income Mortgage Reserve Fund may be so distributed in the discretion of the board of directors in any amount and at any time. Such distribution shall be in addition to the full interest accruing on the Income Mortgage Bonds, except that such distribution may be made in any year in payment in whole or in part of the interest on the Income Mortgage Bonds for such year if and to the extent and only if and to the extent that the Available Net Income for such year shall be insufficient after payment thereout of all interest on the Adjustment Mortgage Bonds, to pay the full interest for such year on the Income Mortgage Bonds. The Adjustment Mortgage and the Income Mortgage may provide for interir payments of interest out of accruing Net Income.

No dividend shall be declared on the stock of the New Company of any class unless at the time of such declaration all amounts in either Reserve Fund shall be set aside for distribution to the Bonds for which such Funds shall be held, and no such dividend shall be paid unless the amounts so set aside shall have been paid to the Corporate Trustee under the proper Mortgage for payment not later than the next succeeding interest date to the Bonds secured by such mortgage. All amounts in both Reserve Funds must be

distributed to the bonds for which such amounts are held, not later than the interest day on such bonds next succeeding the expiration of the period of ten years from and including the earliest fiscal year out of the net income for which any reservation for either Reserve Fund shall have been made. Failure to make such payment shall constitute an event or default under the appropriate mortgage on the happening of which the principal of the bonds issued under such mortgage may become or be declared due.

# Particular Provisions in Mortgages

Provision will be made in the Prior Lien Mortgage and also in the Adjustment Mortgage and in the Income Mortgage to the effect.

- [fol. 332] (a) that certified public accountants selected by the Corporate Trustees under the Prior Lien Mortgage, the Adjustment Mortgage and the Income Mortgage or a majority of them shall annually at the expense of the New Company audit the New Company's annual income statement and balance sheet and otherwise the accounts of the New Company as may be directed by such Corporate Trustees or a majority of them and in such detail as such Corporate Trustees or a majority of them may request, report thereon and on the New Company's financial condition, the report of such accountants to be filed in trinlicate, a counterpart with the Corporate Trustees respectively, under the Prior Lien Mortgage, under the Adjustment Mortgage and under the Income Mortgage; and to be open to inspection by the holder of any bond issued under any of said mortgages;
- (b) that the Corporate Trustees under the Prior Lieu Mortgage, the Adjustment Mortgage and the Income Mortgage or a majority of them, may at any time appoint an expert in railroading to examine at the New Company's expense, the physical condition of the New Company's lines of railroad and equipment and otherwise as such Corporate Trustees or a majority of them may direct and in such detail as such Corporate Trustees or a majority of them may require, and report thereon and on the methods of operation; the report to be filed in triplicate, a counter-

part with the Corporate Trustees respectively under the Prior Lien Mortgage, under the Adjustment Mortgage and under the Income Mortgage, and to be open to inspection by any holder of any bond issued under any of said mortgages;

- (c) that the new Company shall in every annual report state in detail all of the stocks, bonds and other securities of the New Company or of any subsidiary company of its System pledged or sold by the New Company or its respective subsidiary companies during such year, and the amounts in each case realized from every such pledge or sale:
- (d) that equipment coming under the lien of the mortgage shall always be maintained in proper condition and that depreciation thereon be fully provided for through the purchase of new equipment or otherwise without the issue of additional bonds under such mortgage, in such manner that the value and aggregate capacity of said equipment at all times shall not be less than the maximum value and aggregate capacity of said equipment at any time under such mortgage, and that reports shall be made annually to the Corporate Trustees respectively under the Prior Lien Ifol. 3331 Mortgage, under the Adjustment Mortgage and under the Income Mortgage as to the value, capacity and condition of equipment, specifying by manufacturers' names and by marks and numbers all equipment under the lien of said mortgages and indicating particularly the marks and numbers of replacements and of the equipment so replaced; and that all new equipment as acquired, whether to replace old equipment or otherwise, shall be so marked as to identify it as equipment specified in such reports.

Provision may also be made in the New Mortgages for releases of any part of the System of the New Company or of any other property, and also permitting the New Company to such extent and under such restrictions as may be prescribed by the New Mortgages, to provide as it may determine for improvements, betterments and additions to the Kansas City, Fort Scott and Memphis Railway System for extensions and acquisitions and for equipment and to

deal with obligations of that System and for these purposes to issue and renew boads under any existing mortgage of that System, and to issue new bonds of Kansas City, Fort Scott and Memphis Railway Company or of the New Company, secured on that System, or any part thereof, in priority to the existing lease of that System and to any lien of the New Mortgages on that System, but the aggregate prior mortgage indebtedness on that System shall not at any time exceed \$75,000,000.

### Other Restrictions and Limitations

Provision is to be made that the New Company shall not create any additional mortgage, nor increase the amount of Preferred Stock authorized under the Plan, except in each instance after obtaining the consent of the holders of a majority of the whole amount of Preferred Stock outstanding, given at a meeting of the stockholders called for that purpose, and the consent of the holders of a majority of such part of the Common Stock as shall be represented at such meeting, the holders of each class of stock voting separately. During the existence of the Voting Trust, similar consent of holders of like amounts of the respective classes of certificates of beneficial interest shall also be necessary for the purposes indicated.

Provision is also to be made that neither the New Company nor any company controlled by it, shall purchase any line of railroad or take a lease of any line of railroad (other in either case than industrial tracks) or guarantee any part of the principal of, or interest on, any obligatol. 334] tion of or any dividend or other payment on the stock of, any other company or acquire more than twenty-five per cent in amount of the stock of any other company unless in each instance after obtaining the assent of the holders of a majority in amount of the outstanding stock present at a meeting of which not less than twenty days' notice specifying such business to be acted on thereat, shall have been given in the same manner as may be provided in the by-laws for the Annual Meeting.

# Voting Trust

The Preferred and Common Stock of the New Company issued in the reorganization will be assigned (but in the event hereinafter stated, subject to the prior pledge thereof) to the following Voting Trustees: Frederic W. Allen, James W. Lusk, Charles H. Sabin, James Speyer, Frederick Strauss, Eugene V. R. Thayer and Festus J. Wade, and be held by them, jointly, and their successors (under a Trust Agreement prescribing their powers and duties and the method of filling vacancies), for five years. The Voting Trustees will issue certificates of beneficial interest entitling the registered holders thereof to receive, at the time and on the terms and conditions stated in the Voting Trust Agreement, stock certificates for shares of the number and class specified in such certificates, and in the meanwhile to receive payments equal to the dividends received by the Voting Trustees upon shares of the number and class therein specified. In the event of the death or failure or refusal to serve of any person designated as a Voting Trustee, prior to the creation of the Voting Trust, the vacancy shall be filled by the Reorganization Managers.

If, in their unrestricted discretion, the Reorganization Managers shall so determine, the Preferred and Common Stock of the New Company issued in the reorganization may be pledged as additional security for the Prior Lien Bonds for five years, and for that purpose be vested in the Corporate Trustee under the Prior Lien Mortgage by agreement made or approved by the Reorganization Managers, under which the voting power on the stock so pledged shall be exercised by the Corporate Trustee under the Prior Lien Mortgage as from time to time directed by the Voting Trustees, or in the absence of such direction or in case of default in the payment of any instalment of interest on any Prior Lien Bond, as directed by a majority of the Corporate Trustees under the Prior Lien Mortgage, the Adjustment Mortgage and the Income Mortgage.

[fol. 335]

Prior Lien Mortgage Gold Bonds:

Series A Bonds delivered in partial exchange for St. Louis and San Francisco Railroad Company Refunding Mortgage Four Per Cent Gold Bonds General Lien 15-20 Year Five Per Cent Gold Bonds will carry interest from July 1, 1915.

Series A Bonds delivered in exchange or partial exchange for other securities will carry interest from July 1, 1916.

Series B Bonds will carry interest from January 1, 1916.

A. Series A, Four Per Cent, due 1950, redeemable at par and accrued interest to be used in partial exchange for-

Amount of prior lien mortgage bonds, Series A.

	Amount outstanding	bonds, Series A. 4%, issued to partial exchange
St. Louis and San Francisco Railroad Company:		
Refunding Mortgage Four Per Cent Gold Bonds General Lien 15-20 Year Five	\$68,557,000	\$51,417,750
Per Cent Gold Bonds Consolidated Mortgage Four	69,384,000	17,346,000
Per Cent Gold Bonds Southwestern Division First Mortgage Five Per Cent Gold	1,558,000	1,558,000
Bonds	829,000	1,036,250
gage Four Per Cent Gold Bonds Northwestern Division First	145,000	181,250
Mortgage Four Per Cent Gold Bonds	47,000	58,750
St. Louis and San Francisco Railway Company:		
Trust Mortgage Five Per Cent Gold Bonds of 1887 Trust Mortgage Six Per Cent	439,000	548,750
Gold Bonds of 1880 Missouri and Western Division First Mortgage Six Per Cent	182,000	227,500
Gold Bonds St. Louis, Wichita and Western	74,000	92,500
Railway Company: First Mort- gage Six Per Cent Gold Bonds St. Louis and San Francisco Rail- road Company: Kansas City, Fort Scott and Memphis Railway Com-	304,000	380,000
pany Guaranteed Four Per Cent Preferred Stock Trust Certificates [fol. 336] Muskogee City Bridge	15,000,000	11,250,000
Company: First Mortgage Five Per Cent Gold Bonds St. Louis, Memphis and Southeast- ern Railroad Company: First	100,000	125,000
Mortgage Four Per Cent Gold Bonds	225,000	281,250

Amount of prior

### Disposition of New Securities-Continued

	Amount outstanding	bonds, Series A. 4%, issued to partial exchange	p
Chester, Perryville & Ste. Genevieve Railway Company: First Mort- gage Five Per Cent Gold Bonds.	140,000	175,000	
Fort Worth and Rio Grande Railway Company: First Mortgage Four Per Cent Gold Bonds Ozark & Cherokee Central Railway	2,923,000	2,923,000	
Company: First Mortgage Five Per Cent Gold Bonds (see page 26) Onanah, Acme and Pacific Railway	2.880,000	3,600,000	
Company: First Mortgage Six Per Cent Gold Bonds	1,758,000	2,197,500	\$93,398,500
B. Series B, Five Per Cent. due	e 1950, redec	emable at 105	

and accrued interest:

..... \$25,000,000 Sold to Purchase Syndicate . . . For the corporate purposes of the New Company. 6,811,500

\$31,811,500

\$125,210,000

Cumulative Adjustment Mortgage Gold Bonds (carrying interest from July 1, 1915):

Series A, Six Per Cent, due 1955, redeemable at par and accrued interest, to be used in partial exchange for-

Amount of 6% cumulative adjustment mortgage bonds issued Amount in partial outstanding exchange

St. Louis and San Francisco Railroad Company:

Refunding Mortgage Four Per 
 Cent Gold Bonds.
 868,557,000

 General Lien 15-20 Year Five
 69,384,000

 Per Cent Gold Bonds.
 69,384,000
 \$17,139,250 19,658,568

[fol. 337]

Kansas City, Fort Scott and Memphis Railway Company Guaranteed Four Per Cent Preferred Stock Trust Cer-3,750,000 tificates ... 15,000,000 \$40,547,818

### Disposition of New Securities-Continued

Income Mortgage Gold Bonds (ranking for interest from July 1, 1915):

Series A, Six Per Cent, due 1960, redeemable at par, and interest for proportionate part of current semi-annual interest period, to be used in partial exchange for—

	Amount outstanding	Amount of 6% income mort- gage bonds	
St. Louis and San Francisco Rail- road Company:			
General Lien 15-20 Year Five Per Cent Gold Bonds For adjustment of Outstanding Indebtedness, any bonds not so used to be available for	\$69,384,000	\$34,692,000	
the corporate purposes of the New Company		500,000	\$35,192,000
Preferred Stock, Six per cent	:		
For adjustment of Outstanding ness, any stock not so used to able for the corporate purpo New Company	o be avail- ses of the	********	\$7,000,000
Common Stock:			
For sale to Purchase Syndicat For adjustment of Outstanding ness, any stock not so used to	Indebted- be avail-	\$43,180,000	
able for the corporate purpo New Company		5,300,000	\$48,480,000

Non-interest-bearing Script Exchangeable in Round Amounts Will be Issued for Fractional Amounts of new Bonds and Stock (Trust Certificates)

Each \$1,000 face value of existing securities to receive

Existing securities	Cash	Prior Hen bonds, series A.	Prior lien bonds, series B, 5%	Cumulative adjustment bonds, 6%	Income bonds. 6% ce	Common ncome stock onds, (trust 6% certificates)
St. Louis and San Francisco Railroad Company:						
Refunding Mortgage Four Per Cent Gold Bonds General Lien 15-20 Year Five Per Cent Gold	See page 19	8120	:	\$250	:	*
Bonds	See page 19				* * * *	****
For principal		250		250	\$500	
For interest (see page 19)		: : :	:	33.33		
Bonds Southwestern Division First Mortgage Five	\$100	1,000	:		:	:
Per Cent Gold Bonds.	(a) 62.50	1.250	:		:	:
Cent Gold Bonds	(a) 35	1.250	:	:	:	:
Per Cent Gold Bonds (8)	(8) 35	1.250		* * * *		•
St. Louis and San Francisco Railway Company:						
Trust Mortgage Five Per Cent Gold Bonds of 1887	(a) 62.30	1,250	:	:	:	:
1880	(a) 125	1.250				

<sup>369</sup> (a) Includes interest from last matured coupon to July 1, 1916, from which date the Prior Lien Mortgage Bonds to be delivered bear interest.

# Table of Distribution—Continued

Non-interest-hearing Script Exchangeable in Round Amounts Will be Issued for Fractional Amounts of new Bonds and Stock (Trust Certificates)

Each \$1,000 face value of existing securities to receive

			Prior lien bonds,	Prior lien bonds.	Cumulative	Incomo	Common
Existing securities		Cash	serles A. 4%	7.	bonds,	bonds,	onds, (trust
Missouri and Western Division First Mortgage Six Per Cent Gold Bonds.	797 (19)	195	0.40 8		2	2/2	ancares)
St. Louis, Wichita and Western Railway Company:			1,400		0 0 0 0	*	
First Mortgage Six Per Cent Gold Bonds. St. Louis and San Francisco Railroad Company: [fol. 339] Kansas City, Fort Scott and Memphis	(a) 120	120	1.250		0 0 0 0 0		***
Railway Company Guaranteed Four Per Cent							
Auskogee City Bridge Company: First Mortgage	:		750	0 0	250		
Bive Per Cent Gold Bonds. St. Louis, Memphis and Southeastern Railroad Company: First Mortenge Four Day Conc.		95	1,250	•	e e e e e e e e e e e e e e e e e e e	:	# 0 0
Bonds Chester, Perryville & Ste. Genevieve Rajway Com.		00	1,250	:	* * * * * * * * * * * * * * * * * * * *	:	9 9 9
Pemiscot Railroad Commun: First Mortrana Six	()	12.50	1,250		0 0 0 0	:	
Fer Cent Gold Bonds.  Kennett & Osceola Railroad Company: First More.	Para	Par and Int.				:	:
Southern Missouri and Arkansas Railroad Com-	Para	Par and Int.	* * * * * * * * * * * * * * * * * * * *				:
Fort Worth and Rio Grande Railway Company	Para	Par and Int.		* * * * * * * * * * * * * * * * * * * *			
First Mortgage Four Per Cent Gold Bonds			1,660				

Morkage Five Per Cent Gold Bonds (see page							,
28) (a) 17.50 Junuah, Acme and Pacific Railway Company, First	(a)	17.50	1,250			:	:::
Mortgage Six Per Cent Gold Bonds	(c)	15	1,250	****		:	:
St. Louis and San Francisco Railroad Company (subject to payment required by the Plan. See also page 22);							
First Preferred Stock.	:	:	:		:		\$1,000
Second Preferred Stock			:	(b) 500			000
			* * *	(b) 500	0 0 0		850

(a) Includes interest from last matured coupon to July 1, 1916, from which date the Prior Lien Mortgage Bonds to be delivered bear interest.

(c) Interest from last matured coupon to July 1, 1916, from which date the Prior Lien Mortgage Bonds to be delivered bear interest.

Prior Lien Mortgage Bonds, Series A, delivered under the plan in partial exchange for St. Louis and San Francisco Railroad Company Refunding Mortgage Four Per Cent Gold Bonds, St. Louis and San Francisco Railroad Company General Lien 15-20 Year Five Per Cent Gold Bonds, are to carry interest at the rate of four per cent. per annum from July 1, 1915.

Prior Lien Mortgage Bonds, Series A, delivered under the Plan in exchange or partial exchange for other securities are to carry interest at the rate of four per cent, per

annum from July 1, 1916.

Prior Lien Mortgage Bonds, Series B, delivered under the Plan are to carry interest at the rate of five per cent.

per annum from January 1, 1916.

Interest on the Six Per cent. Cumulative Adjustment Mortgage Bonds, Series A, delivered under the Plan, will accrue from July 1, 1915, and from that date the Six Per Cent. Income Mortgage Bonds, Series A, delivered under the Plan, will rank for interest.

Holders of the following bonds (with coupons as stated) and of the following trust certificates who shall have complied with the condittions of the Plan and Agreement and call be entitled to the benefits thereof will receive on the completion of the reorganization and surrender of their certificates of deposit in negotiable form, together with such certificates as may be required under the Federal Income Tax Laws, at the rate for each \$1,000 of principal, as follows:

St. Louis and San Francisco Railroad Company:

Refunding Mortgage Four Per cent. Gold Bonds (with coupon maturing July 1, 1914, and subsequent coupons).

\$750.00 Prior Lien Mortgage Bonds, Series A (Four Per Cent.), carrying interest from July 1, 1915; \$250.00 Six Per Cent. Cumulative Adjustment Mortgage Bonds, Series A, and in Cash an amount equal to the interest instalments maturing July 1, 1914, January 1, 1915, and July 1, 1915, with interest at six per cent. per annum from the respective [fol. 341] dates of maturity to the date set by the Reorganization Managers for payment; but where such interest has

been received by holders of certificates of deposit and noted on their certificates, to be paid to the holders of such coupons and claims for interest.

St. Louis and San Francisco Railroad Company:

General Lien 15-20 Year Five Per cent Gold Bonds (with coupon maturing May 1, 1914, and subsequent coupons).

\$250.00 Prior Lien Mortgage Bonds, Series A (Four Per Cent), carrying interest from July 1, 1915; \$250.00 Six Per Cent Cumulative Adjustment Mortgage Bonds, Series A; \$33.33 Six Per Cent Cumulative Adjustment Mortgage Bonds, Series A, in adjustment of interest at Five Per Cent on \$1,000 principal from November 1, 1914, to July 1, 1915; \$500.00 Six Per Cent Income Mortgage Bonds, Series A, and in Cash an amount equal to the interest instalments maturing May 1, 1914, and November 1, 1914, with interest at six per cent per annum from the respective dates of maturity to the date set by the Reorganization Managers for payment; but subject to the deduction of amounts advanced to holders of certificates of deposit in respect of the interest instalment of May 1, 1914, and noted on certificates of deposit, with interest.

St. Louis and San Francisco Railroad Company:

Consolidated Mortgage Four Per Cent Gold Bonds (with coupon maturing January 1, 1917, and subsequent coupons).

\$1,000.00 Prior Lien Mortgage Bonds, Series A (Four Per Cent), carrying interest from July 1, 1916; \$100.00 Cash.

St. Louis and San Francisco Railroad Company:

Southwestern Division First Mortgage Five Per Cent Gold Bonds (with coupon maturing October 1, 1916, and subsequent coupons).

[fol. 342] \$1,250.00 Prior Lien Mortgage Bonds, Series A (Four Per Cent), carrying interest from July 1, 1916; \$62.50 Cash.

St. Louis and San Francisco Railroad Company:

Central Division First Mortgage Four Per Cent Gold Bonds (with coupon maturing October 1, 1916, and subsequent coupons).

\$1,250.00 Prior Lien Mortgage Bonds, Series A (Four Per Cent), carrying interest from July 1, 1916; \$35.00 Cash.

St. Louis and San Francisco Railroad Company:

Northwestern Division First Mortgage Four Per Cent Gold Bonds (with coupon maturing October 1, 1916, and subsequent coupons); \$1,250.00 Prior Lien Mortgage Bonds, Series A (Four Per Cent), carrying interest from July 1, 1916; \$35.00 Cash.

St. Louis and San Francisco Railway Company:

Trust Mortgage Five Per Cent Gold Bonds of 1887 (with coupon maturing October 1, 1916, and subsequent coupons).

\$1,250.00 Prior Lieu Mortgage Bonds, Series A (Four Per Cent), carrying interest from July 1, 1916; \$62.50 Cash.

St. Louis and San Francisco Railway Company:

Trust Mortgage Six Per Cent Gold Bonds of 1880 (with coupon maturing August 1, 1916, and subsequent coupons).

\$1,250.00 Prior Lien Mortgage Bonds, Series A (Four Per Cent), carrying interest from July 1, 1916; \$125.00 Cash.

[fol. 343] St. Louis and San Francisco Railway Company:

Missouri and Western Division First Mortgage Six Per Cent Gold Bonds (with coupon maturing August 1, 1916, and subsequent coupons).

\$1,250.00 Prior Lien Mortgage Bonds, Series A (Four Per Cent), carrying interest from July 1, 1916; \$125.00 Cash.

St. Louis, Wichita and Western Railway Company:

First Mortgage Six Per Cent Gold Bonds (with coupon maturing September 1, 1916, and subsequent coupons).

\$1,250.00 Prior Lien Mortgage Bonds, Series A (Four Per Cent), carrying interest from July 1, 1916; \$125.00 Cash.

[fol. 344] Reorganization of St. Louis and San Francisco Railroad Company

Modification of Plan and Agreement, Dated November 1, 1915

The undersigned, J. & W. Seligman & Co., and Speyer & Co., as Reorganization Managers under the Plan and Agreement dated November 1, 1915, for the Reorganization of St. Louis and San Francisco Railroad Company, hereby modify said Plan by substituting in the second line of the fourth paragraph on page 21 of said plan, for the words "October 1, 1916" the words "January 1, 1917" and by striking out the last line of said paragraph as so modified will read as follows:

Chester, Perryville & Ste. Genevieve Railway Company:

First Mortgage Five Per Cent Gold Bonds (with coupon maturing January 1, 1917, and subsequent coupons).

\$1,250.00 Prior Lien Mortgage Bonds, Series A (Four Per Cent), carrying interest from July 1, 1916, and by striking out the letter and figures "(c) \$12.50" in the first column on page 18 of said Plan opposite the words "Chester, Perryville & Ste. Genevieve Railway Company: First Mortgage Five Per Cent Gold Bonds."

In witness whereof said Reorganization Managers have subscribed this instrument as of the 5th day of April, 1916.

J. & W. Seligman & Co., Speyer & Co., Reorganization Managers.

[fol. 345] St. Louis and San Francisco Railroad Company:

Kansas City, Fort Scott and Memphis Railway Company Quaranteed Four Per Cent Preferred Stock Trust Certificates.

\$750.00 Prior Lien Mortgage Bonds, Series A (Four Per Cent), carrying interest from July 1, 1916; \$250.00 Six Per Cent Cumulative Adjustment Mortgage Bonds, Series A, carrying interest from July 1, 1916.

Muskogee City Bridge Company:

First Mortgage Five Per Cent Gold Bonds (with coupon maturing January 1, 1917, and subsequent coupons).

\$1,250.00 Prior Lien Mortgage Bonds, Series A (Four Per Cent), carrying interest from July 1, 1916; \$50.00 Cash.

St. Louis, Memphis and Southeastern Railroad Company:

First 1 rtgage Four Per Cent Gold Bonds (with coupon maturing January 1, 1917, and subsequent coupons).

\$1,250.00 Prior Lien Mortgage Bonds, Series A (Four Per Cent), carrying interest from July 1, 1916; \$50.00 Cash.

Chester, Perryville & Ste. Genevieve Railway Company:

First Mortgage Five Per Cent Golds Bonds (with coupon maturing October 1, 1916, and subsequent coupons).

\$1,250.00 Prior Lien Mortgage Bonds, Series A (Four Per Cent), carrying interest from July 1, 1916; \$12.50 Cash.

Pemiscot Railroad Company:

First Mortgage Six Per Cent Gold Bonds.

Par and accrued interest to date of payment, in cash. [fol. 346] Kennett & Osceola Railroad Company:

First Mortgage Six Per Cent Gold Bonds (with coupon maturing December 1, 1916, and subsequent coupons).

Par and accrued interest to date of payment, in cash.

Southern Missouri and Arkansas Railroad Company:

First Mortgage Five Per Cent Gold Bonds (with coupon maturing January 1, 1917, and subsequent coupons).

Par and accrued interest to date of payment, in cash.

Fort Worth and Rio Grande Railway Company:

First Mortgage Four Per Cent Gold Bonds (with coupon maturing January 1, 1917, and subsequent coupons).

\$1,000.00 Prior Lien Mortgage Bonds, Series A (Four Per Cent), carrying interest from July 1, 1916.

Quanah, Acme and Pacific Railway Company:

First Mortgage Six Per Cent Gold Bonds (with coupon maturing October 1, 1916, and subsequent coupons).

\$1,250.00 Prior Lien Mortgage Bonds, Series A (Four Per Cent), carrying interest from July 1, 1916; \$15.00 Cash.

St. Louis and San Francisco Railroad Company:

First Preferred Stock. Second Preferred Stock. Common Stock.

No holder of stock will be entitled to deposit his stock under the Plan or to receive a certificate of deposit therefor without making at the time of deposit the required payment of \$5 per share. Any holder of stock may, at the time of deposit thereof under the Plan, elect to prepay the entire purchase price of the securities which such holder shall be entitled to purchase under the Plan and such election will be appropriately noted on his certificate of deposit.

Holders of certificates of deposit for stock will be entitled to receive upon the completion of the reorganization and on [fol. 347] the surrender of their certificates of deposit, either Purchase Warrants of Fully Paid Subscription Certificates, both of which will be issued by Guaranty Trust Company of New York and will be delivered by the Reorganization Managers on behalf of the Purchase Syndicate (see page 27.) Each holder of a certificate of deposit for stock bearing notation of election to prepay the entire purchase price of the New Securities which such holder shall be entitled to purchase, will, upon making payment of the entire purchase price at the time and otherwise as hereafter stated, together with the interest accrued on the Prior Lien Mortgage Bonds, be entitled to receive a Fully Paid Subscription Certificate; each holder of a certificate of deposit for stock not bearing notation of such election, will be entitled to receive a Purchase Warrant. If the Reorganization Managers shall, in carrying out the Plan, have acquired, for the purposes of the reorganization, all the outstanding stock and First Mortgage Six Per Cent Gold Bonds of New Mexico and Arizona Land Company, the Reorganization Ma rers will, on the completion of the reorganization and on surrender of their certificates of deposit deliver to the respective holders of such certificates of deposit, stock of the recapitalized Land Company (see page 7) to a par amount which shall be such proportion of \$500. 000 as the par amount of deposited stock represented by such certificates of deposit shall bear to the aggregate par amount of stock deposited under the Plan. For fractional interests scrip may be delivered. So far as the reorganization or the issue of securities or stock under the Plan may be subject to the approval or authorization of any public utilities or public service commission in any state in which any part of the property is situated or in which the Reorganization Managers may in their discretion determine to organize the New Company, or of any other commission having authority in the premises, the amount of capitalization to be issued in the reorganization may be reduced by such amount as the Reorganization Managers may in their discretion determine, in order to comply with the order of. or to obtain the authorization or approval of, any such commission. In the event of such reduction of capitalization. the whole of such reduction shall be made in Common Stock and in the amount of stock trust certificates to be sold to the Purchase Syndicate, and by it in turn offered to depositing stockholders of the three classes: the amounts of stock trust certificates deliverable, respectively, under the three classes of Purchase Warrants and Fully Paid Subscription Certificates being reduced by an equal percentage.

[fol. 348] The amounts of Prior Lien Mortgage Bonds and Common Stock (trust certificates) to be specified in such Purchase Warrants shall be at the following rates per share of stock represented by the surrendered certificates of deposit, subject as to the amount of Common Stock

(trust certificates) to reduction as stated:

# First Preferred Stock:

\$50 Prior Lien Mortgage Bonds, Series B (Five Per Cent), or cash at 85% flat for bonds withdrawn by the Purchase Syndicate and therefore not delivered; \$100 Common Stock (trust certificates).

Second Preferred Stock:

\$50 Prior Lien Mortgage Bonds, Series B (Five Per Cent), or cash at 85% flat for bonds withdrawn by the Purchase Syndicate and therefore not delivered; \$90 Common Stock (trust certificates).

### Common Stock:

\$50 Prior Lien Mortgage Bonds, Series B (Five Per Cent), or cash at 85% flat for bonds withdrawn by the Purchase Syndicate and therefore not delivered; \$82 Common Stock (trust certificates).

The Purchase Warrants will certify that on payment on the date therein specified, which is to be the date of maturity of the loan to be made by the Loan Syndicate (see page 28), of the sums specified in such Purchase Warrant. which shall be at the rate of \$45 for each share of stock represented by the surrendered certificate of deposit, said Trust Company on surrender of such Purchase Warrant and on payment of the accrued interest on the Prior Lien Mortgage Bonds delivered will deliver to the bearer of such Purchase Warrant, the Prior Lien Mortgage Bonds and Common Stock (trust certificates) therein specified or will, in lieu of the delivery of any or all of such Prior Lien Mortgage Bonds, pay in cash at 85% flat for bonds not delivered. Prior Lien Mortgage Bonds deliverable under the Purchase Warrants will be delivered carrying all unmatured coupons. Holders of Purchase Warrants will not be entitled to the interest on the Prior Lien Mortgage Bonds maturing on or prior to the time of their delivery. [fol. 349] Failure to pay the purchase price when payable will forfeit all rights in respect of bonds and stock (trust certificates) specified in the Purchase Warrant and all rights under the Purchase Warrant and under the Plan.

The amounts of Prior Lien Mortgage Bonds and Common Stock (trust certificates) to be specified in the Fully Paid Subscription Certificates shall be at the following rates per share of stock represented by the surrendered certificates of deposit bearing notation of election to prepay the entire purchase price, subject as to the amount of Common Stock (trust certificates) to reduction as stated:

First Preferred Stock:

\$50 Prior Lien Mortgage Bonds, Series B (Five Per Cent); \$100 Common Stock (trust certificates).

Second Preferred Stock:

\$50 Prior Lien Mortgage Bonds, Series B (Five Per Cent); \$90 Common Stock (trust certificates).

Common Stock:

\$50 Prior Lien Mortgage Bonds, Series B (Five Per Cent); \$82 Common Stock (trust certificates).

The Fully Paid Subscription Certificates will certify that the entire purchase price therein specified has been paid and that on and after the date therein specified, which is to be the date of maturity of the loan to be made by the Loan Syndicate (see page 28), the bearer will be entitled on surrender of such Fully Paid Subscription Certificates, to the delivery of Prior Lien Mortgage Bonds, Series B (Five Per Cent) and Common Stock (trust certificates), to the amount specified in such Fully Paid Subscription Certificates and meantime on presentation thereof for proper notation thereon, to payment of the accruing interest collected on the Prior Lien Mortgage Bonds called for by such Fully Paid Subscription Certificates or to the delivery of the coupons therefor. With the consent of the Reorganization Managers, deliveries may be earlier made to holders of Fully Paid Subscription Certificates.

Holders of certificates of deposit bearing notation of election to prepay the entire purchase price must make such payment within such period as may be fixed by the Reor-[fol. 350] ganization Managers for the purpose. Failure to make such payments within the period so fixed by the Reorganization Managers will forfeit all rights to purchase bonds and stock (trust certificates) and all rights of purchase under the Plan as well as the deposited stock represented by such certificates of deposit and will terminate all rights of the holders of such certificates of deposit, and such certificates of deposit shall become void.

# Adjustment of Other Debt

In connection with the Plan, agreements substantially to the following effect have been made or, it is contemplated, will be made with holders of the Secured Debt hereinafter mentioned, through their respective Committees, for the adjustment and discharge of the indebtedness and liabilities of St. Louis and San Francisco Railroad Company on or in respect to the class of security specified (including unpaid coupons and interest). The Reorganization Managers may in their discretion at such time or times as they may determine, call for deposit of any of the securities consisting of the Secured Debt or provide otherwise for the method of their participation in the Plan. The terms hereinafter stated are on the basis of the adjustment of the entire secured debt of the specified class and are exclusive of the compensation and expenses of any such Committee. amounts payable and deliverable by the Reorganization Managers in respect of securities of any class approving and accepting terms of settlement through a Committee, will be paid and delivered in block to such Committee, the Reorganization Managers assuming no responsibility in respect of the disposition or distribution thereof by such Committee. The arrangement in every case will be conditional on acceptance and approval by holders of the purticular class of security to an amount satisfactory to the Reorganization Managers and to the Plan and Agreement becoming effective and being consummated, and all payments and deliveries by the Reorganization Managers are to be made on the consummation of the Plan.

A. \$28,582,000 St. Louis and San Francisco Railroad Company, New Orleans, Texas and Mexico Division First Mortgage 4½% and 5% Gold Bonds (with coupon maturing September 1, 1913, and subsequent coupons).

The Reorganization Managers

- 1. to pay and to deliver
- (a) \$500,000 in cash,

[fol. 351] (b) \$500,000 Six Per Cent Income Mortgage Bonds, Series A,

- (e) \$636,800 Six Per Cent Preferred Stock (trust certificates);
- 2. If and to the extent acquired by the Reorganization Managers under the Plan to cancel (a) the \$480,000 Equipment Notes, Series A. of the New Orleans, Texas and Mexico Railroad Company held under the General Lien Mortgage: and (b) the notes of the New Orleans, Texas and Mexico Railroad Company and its indebtedness to St. Louis and San Francisco Railroad Company now pledged to secure the Two Year Six Per Cent Secured Gold Notes of said St. Louis and San Francisco Railroad Company, and any other indebtedness of the New Orleans, Texas and Mexico Railroad Company to St. Louis and San Francisco Railroad Company and any indebtedness of the St. Louis, Brownsville and Mexico Railway Company to St. Louis and San Francisco Railroad Company now constituting treasury assets of said Railroad Company; and if and to the extent acquired by the Reorganization Managers under the Plan. to surrender to the reorganized New Orleans, Texas and Mexico Company for cancellation, \$454,000 New Orleans, Texas and Mexico Division First Mortgage 5% Gold Bonds (Certificates of Deposit) now constituting treasury assets (but in part pledged) of the St. Louis and San Francisco Railroad Company:
- 3. If and to the extent acquired by the Reorganization Managers under the Plan, to transfer to the reorganized New Orleans, Texas and Mexico Company (a) the securities and stock of San Benito and Rio Grande Valley Railway Company now pledged to secure the Two Year Six Per Cent Secured Gold Notes of St. Louis and San Francisco Railroad Company and any other securities and stock of said San Benito and Rio Grande Valley Railway Company now constituting treasury assets of St. Louis and San Francisco Railroad Company and (b) the stock of the New Orleans, Texas and Mexico Railroad Company now pledged to secure said Notes and any other stock of said Railroad Company now constituting treasury assets of St. Louis and San Francisco Railroad Company.

The New Company to undertake that the Frisco Refrigerator Company shall continue to and including September 15, 1923, the existing lease to said Refrigerator Company of various refrigerator cars, part of the equipment embraced in the Equipment Trust Agreement of the New Or-[fol. 352] leans, Texas and Mexico Railroad Company, dated September 15, 1911, and that the instalment of rents payable under said lease due or to become due shall be promptly paid when due and that all the covenants thereof on the part of said Refrigerator Company shall be duly performed; an undertaking to be given by the reorganized New Orleans, Texas and Mexico Company that the equipment embraced in such lease, on the termination of such lease, will be transferred to the New Company or to said Refrigerator Company.

The liability of St. Louis and San Francisco Railroad Company to be terminated on the outstanding loan of \$200,000 secured by certain terminal properties in New Orleans which have been judicially declared to have been purchased with funds of the New Orleans, Texas and Mexico Railroad Company and, subject to the payment of such loans, to be embraced in the New Orleans, Texas and Mexico Division

First Mortgage.

B. \$2,250,000 St. Louis and San Francisco Railroad Company Two-Year Five Per Cent Secured Gold Notes (with coupon maturing June 1, 1913), secured by the pledge of

\$2,500,000 St. Louis and San Francisco Railroad Company, Chicago and Eastern Illinois Railroad Company Stock

Trust Certificates.

\$1,490,000 Kansas City, Fort Scott and Memphis Railway Company Guaranteed Four Per Cent Preferred Stock Trust Certificates.

\$100,000 St. Louis and San Francisco Railroad Company General Lien 15-20 Year Five Per Cent Gold Bonds.

- 1. The trust agreement securing the Notes to be foreclosed and pledged securities, all of which are dealt with under the Plan, to be made subject to the Plan if acquired by the Reorganization Managers or Noteholders' Committee.
  - 2. The Reorganization Managers to deliver

\$834,795.00 Six Per Cent Preferred Stock (trust certificates),

\$556,582.50 Common Stock (trust certificates).

C. \$2,600,000 St. Louis and San Francisco Railroad Company Two Year Six Per Cent Secured Gold Notes (with

coupon maturing September 1, 1913, and subsequent coupons).

[fol. 353] 1. The trust agreement securing the Notes to be foreclosed and the securities acquired by the Noteholders' Committee; the pledged securities other than the pledged Preferred Stock of the Kirby Lumber Company to be transferred to the Reorganization Managers.

2. The Reorganization Managers to pay and to deliver \$270,000 in cash,

\$1,350,000 Six Per Cent Preferred Stock (trust certificates).

- D. St. Louis and San Francisco Railroad Company Trust Certificates for Preferred Stock Chicago and Eastern Illinois Railroad Company, \$12,153,750; Common Stock Chicago and Eastern Illinois Railroad Company, \$16,944,500.
- 1. The outstanding trust certificates for Chicago and Eastern Illinois Railroad Company stock to be surrendered pursuant to the terms thereof and of the trust agreements securing them in exchange for the stock of the Chicago and Eastern Illinois Railroad Company represented by the trust certificates surrendered.
  - 2. The Reorganization Managers to deliver

in respect of Trust Certificates for Chicago and Eastern Illinois Railroad Company Preferred Stock so surrendered at the rate of each share of Preferred Stock represented by the surrendered Trust Certificates,

\$18.00 Six Per Cent Preferred Stock (trust certificates), \$2.50 Common Stock (trust certificates);

in respect of Trust Certificates for Chicago and Eastern Illinois Railroad Company Common Stock so surrendered at the rate for each share of Common Stock represented by the surrendered Trust Certificates,

\$30.00 Six Per Cent Preferred Stock (trust certificates), \$4.25 Common Stock (trust certificates).

E. \$2,880,000 Ozark & Cherokee Central Railway Company First Mortgage Five Per Cent Gold Bonds.

[fol. 354] 1. These bonds are to be transferred to the Reorganization Managers.

2. The Reorganization Managers to pay in money onehalf of one per cent. of the amount of said First Mortgage Bonds and at their election either (a) to deliver Prior Lien Mortgage Bonds, Series A, Four Per Cent. to the amount of 125 per cent. of said First Mortgage Bonds or, (b) to deliver Prior Lien Mortgage Bonds, Series A, Four Per Cent. to the Amount of 100 per cent. of First Mortgage Bonds and to pay in money 20 per cent. of the amount of said First Mortgage Bonds, and in either case interest to be adjusted.

F. \$14,000,000 New Orleans Terminal Company Guaranteed First Mortgage Four Per Cent. Gold Bonds.

Guaranteed both as to principal and interest, jointly and severally by Southern Railway Company and St. Louis and San Francisco Railroad Company.

- 1. The Southern Railway Company which has taken over the stock of the Terminal Company formerly held by St. Louis and San Francisco Railroad Company to release that Company and to cause the Terminal Company to release it, from all indebtedness or liability now existing or which may hereafter arise on the various agreements with respect to the properties and stock of the Terminal Company or on said guaranty.
- 2. The Reorganization Managers to pay and to deliver \$116,000 in cash, \$650,000 Six Per Cent. Preferred Stock (trust certificates).

# G. Unsecured Debt.

It is intended to make adjustments with holders of unsecured debt when the establishment of claims under the general creditors bill shall in the judgment of the Reorganization Managers have proceeded to a point making it practicable to do so.

The Reorganization Managers may make adjustments of indebtedness. They may, in their discretion, use any of the securities issuable in the Reorganization and not required for other specified purposes or procure the issue of additional amounts of securities of any class or character under the Plan. All statements of capitalization in the Plan omit consideration of any additional securities which may be issued or used for this purpose.

[fol. 355] Estimated Cash Requirements	
Equipment Trust Obligations maturing after July 1, 1916, and prior to July 2, 1917 \$54,000 Pemiscot Railroad Company, First	\$1,952,752
Mortgage Six Per Cent Gold Bonds \$65,000 Kennett & Osceola Railroad Company	54,000
First Mortgage Six Per Cent Gold Bonds \$4,500 Southern Missouri and Arkansas Railroad Company First Mortgage Five Per	65,000
Cent Gold Bonds	4,500
interest on the Refunding Mortgage Bonds May 1, 1914, and November 1, 1914, interest on	4,113,420
the General Lien Bonds	3,469,200
1, 1916	769,167
underlying bonds	310,650
Claims (estimated)	2,000,000
Lien Bonds pursuant to the Plan	2,750,550
Commissions to Purchase Syndicate	1,000,000
Commissions to Loan Syndicate Organization, franchise and other taxes, in-	675,000
cluding stamps  Expenses of Committees and other representatives of existing securities, including their	1,400,000
Other reorganization expenses, including the compensation of the Reorganization Mana-	1,000,000
gers, legal expenses and miscellaneous ex- penses  Improvements and betterments, additions, ac- quisitions, including Equipment, and work-	1,258,000
ing capital for New Company	4,177,761
mg capanit as a section,	\$25,000,000
	420,000,000

[fol. 356] The Receiver's estimate that on July 1, 1916, the cash in hand, after providing funds for payment of Equipment Trust Obligations maturing up to July 2, 1916, inclusive, of interest on securities paid regularly during the receivership, and of the cost of current improvements, will be not less than the sum of \$3,193,000, the greater part of which should be available for the corporate purposes of the New Company.

# Provision for Cash Requirements

For the purpose of meeting the estimated cash requirements of the Plan, Messrs. Speyer & Co., J. & W. Seligman & Co. Guaranty Trust Company of New York and Lee, Higginson & Co. have undertaken to form a Purchase Syndicate, of which they will be Syndicate Managers. The Purchase Syndicate, among other things, will

(a) purchase

\$25,000,000 Prior Lien Mortgage Bonds, Series B (Five Per Cent),

\$43,180,000 Common Stock (trust certificates),

for the sum of \$25,000,000 (and accrued interest on the bonds, against which will be credited the amounts paid by stockholders as a condition of participating in the Plan, and will offer the Prior Lien Mortgage Bonds and Common Stock (trust certificates) so purchased, to the extent and on the terms stated in the Plan, to depositing holders of stock who shall have complied with the conditions of the Plan;

(b) purchase at the request of the reorganization Managers additional Prior Lien Mortgage Bonds, to an amount not exceeding in the aggregate \$5,000,000.

No provision has been made for underwriting the cash required for payment to holders of non-assenting Refunding Mortgage Bonds and General Lien Bonds of their distributive share in the proceeds of the foreclosure sale, as in the judgment of the Reorganization Managers, the failure to deposit undeposited bonds has been in the main due to existing conditions in Europe, where such non-deposited

bonds are mainly held, but it is intended on the completion of Reorganization, to set aside under such restrictions as the Reorganization Managers shall deem proper, the new securities and cash to which under the Plan, holders of nondeposited Refunding Mortgage Bonds and General Lien [fol. 357] Bonds would be entitled if deposited under the Plan, if deemed practicable until the expiration of one year after the conclusion of peace by treaty, to be deliverable on the terms stated in the Plan, at any time during such period. to holders of such bonds who may desire to avail themselves of the benefits of the Plan and shall give satisfactory reason for their previous inability to deposit the same under the Plan: the securities and cash deliverable in respect of any non-deposited bond to be available for providing, if necessary, the moneys required to pay the cash distributive share of such bond. Such Refunding Mortgage Bonds deposited under the Agreement of June 20, 1914, and such General Lien Bonds deposited under the Agreement of May 28, 1913, as may be withdrawn from said respective agreements, will not be entitled to avail themselves of such provision.

Guaranty Trust Company of New York has undertaken to form a Loan Syndicate, of which it will be Syndicate Manager, which among other things will, against the pledge by the Purchase Syndicate of such of the Prior Lien Mortgage Bonds and Common Stock (trust certificates), specified in subdivisions (a) above, as shall not be purchased and paid for in full by depositing stockholders, and reserved against Fully Paid Subscription Certificates, agree to advance to the Purchase Syndicate, up to ninety per cent of the face amount of said bonds so pledged. The Loan Syndicate will agree to make, for account of the Purchase Syndicate, deliveries in accordance with the terms of the Purchase Warrants, to holders thereof complying

with the terms of such Purchase Warrants.

The Reorganization Managers for their services shall be entitled to compensation in such usual amount as shall be determined to be fair by the persons, or a majority of them, who at the time of such determination are respectively Presidents of The New York Trust Company, Columbia Trust Company and The Equitable Trust Company of New York.

The compensation and commissions to be paid to the Reorganization Managers and the respective Syndicates are to be paid as part of the expenses of the reorganization. The Reorganization Managers may become participants in either syndicate.

[fols. 358 & 359] Comparative Tables Showing Capitalization, Fixed and Contingent Interest Charges, Earnings, Average Maintenance Charges, and Mileage

The statements and figures in the accompanying Tables, as well as elsewhere throughout the Plan, have been furnished by the Receivers or by officers of the Railroad Company.

### Capitalization and Fixed Charges

# A. Capitalization and Interest Charges of Present Company as of June 30, 1915

Certificates, Equipment Trust Obligations, and Guaranteed Securities and Stock in hands of public (with the fixed charges thereon) dealt with under the Plan excluding Unsecured Debt, floating claims, etc., and includes the First Mortgage Bonds of the Quanah, Acme and Pacific Railway Company, although not operated as part of the System, but excludes the stock of that Company. The following table shows the total amount of Receivers' Certificates, Bonds, Notes, Trust

interest charge or guaranty	\$180,000	2,742,280 3,464,200 62,320	41,450 $5,800$ $1,880$	112,500 156,000 21,950
	*\$3,000,000 Receivers' Certificates (maturing prior to July 2, +4,626,636 Equipment Trust Certificates (maturing prior to July 2, 1917, for which cash provided so far as not paid by Receivers' Provided to France (maturing prior to July 2, 1917, for which cash provided so far as not paid by Receivers' Provided to July 2, 1917, for which cash provided so far as not paid by Receivers' Provided to July 2, 1917, for which cash provided so far as not paid by Receivers' Provided to July 2, 1917, for which cash provided so far as not paid by Receivers' Provided to July 2, 1917, for which cash provided so far as not paid by Receivers' Provided to July 2, 1917, for which cash provided so far as not paid by Receivers' Provided to July 2, 1917, for which cash provided so far as not paid by Receivers' Provided to July 2, 1917, for which cash provided so far as not paid by Receivers' Provided to July 2, 1917, for which cash provided to Jul	Refunding Mortgage 4% Gold Bonds  2,742,280 General Lien 15-20 Year 5% Gold Bonds in hands of public 3,464,200 Consolidated Mortgage 4% Gold Bonds		
	*\$3,000,000 †4,626,636	68,557,000 69,284,000 1,558,000	829,000 145,000 47,000	2,250,000 2,600,000 439,000

10,920	4,740	18,240	007 073	5,000	000,6	7,000	3,240	3,900	225
St. Louis and San Francisco Railway Company Trust Mortgage 6% Gold Bonds of 1880	Missouri and Western Division 1st Mortgage 6% Gold Bonds	St. Louis Wichita and Western Railway Company 1st Mortgage 6% Gold Bonds	Memphis Railway Company 1st Certificates in hands of	public Muskogee City Bridge Company 1st Mortgage 5% Gold Bonds	St. Louis, Memphis and Southeastern Railroad Company 1st Mortgage 4% Gold Bonds in hands of public	Chester, Perryville & Ste. Genevieve Railway Company 1st Mortgage 5% Gold Bonds	Pemiscot Railroad Company 1st Mortgage 6% Gold Ronds	Kennett & Osceola Railroad Company 1st Mortgage 6% Gold Bonds	Southern Missouri and Arkansas Railroad Company 1st Mortgage 5% Gold Bonds
182,000	++79,000	304,000	13,510,000	100,000	225,000	140,000	54,000	65,000	[fol. 361] 4,500

\*Paid January 2, 1916, #\$2.673,884 principal amount paid or to be paid on or before July 1, 1916, ##\$5,000 of bonds have been redeemed by sinking fund.

## Capitalization and Fixed Charges-Continued

St Louis and San Francisco Bailroad Company First Preferred	\$237,286,386
Chicago and Eastern Illinois Common Stock Trust Certifi- cates in hands of public	14,444,500
Chicago and Eastern Illinois Preferred Stock Trust Cer- tificates 486,150	12,153,750
New Orleans, Terminal Company 1st Mortgage 4% Gold 280,000 Bonds (being half of issue)	2,000,000
New Orleans, Texas and Mexico Division 1st Mortgage 4½% Gold Bonds (French Series) 225,000	5,000,000
New Orleans, Texas and Mexico Division 1st Mortgage 5% Gold Bonds 1,156,400	23,128,000
gage 5% Gold Bonds Quanah, Acme and Pacific Railway Company et Mort- gage 6% Gold Bonds 105,480	1,758,000
ande Railway Company 1st Mort- ral Railway Company 1st Mort-	2,923,000

\$10,714,075

St. Louis and San Francisco Railroad Company First Preferred Stock (includes \$6,535.10 stock in Treasury).

St. Louis and San Francisco Railroad Company Second Preferred Stock (includes \$53 stock in Treasury).

16,000,000

\$9,484,000 St. Louis and San Francisco Railway Company General Anortgage 5% and 6% Gold Bonds maturing 1931 Sundry Rentals and Sinking Funds (year 1915) Sundry Rentals and Sinking Funds (details as per page 31) Fort Scott and Memphis Railway Company Leasehold and Auxiliary Companies' Bonds, Rentals, Sinking Fund and Miscellaneous (details as per page 31) \$2,817,120 32 amount to (year 1915) \$4,172,249 68	000,000	29,000,000 St. Louis and San Francisco Kauroad Company Common Score. (includes \$7,649.60 stock in Treasury).	
Undisturbed Securities and Rentals  St. Louis and San Francisco Railway Company General Mortgage 5% and 6% Gold Bonds maturing 1931  Equipment Trust Certificates maturing after July 1,1917  (about) Sundry Rentals and Sinking Funds (year 1915)  Total.  The fixed charges in connection with the Kansas City, Fort Scott and Memphis Railway Company Leasehold and Auxiliary Companies' Bonds, Rentals, Sinking Fund and Miscellancous (details as per page 31)  \$2,817,120 32	3,386	For comparison with the table on next page, there should be added to the above:	
St. Louis and San Francisco Railway Company General Mortgage 5% and 6% Gold Bonds maturing 1931  Equipment Trust Certificates maturing after July 1,1917 (about) Sundry Rentals and Sinking Funds (year 1915)  Total.  The fixed charges in connection with the Kansas City, Fort Scott and Memphis Railway Company Leasehold and Auxiliary Companies' Bonds, Rentals, Sinking Fund and Miscellaneous (details as per page 31)  \$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$		Undisturbed Securities and Rentals	
Total.  The fixed charges in connection with the Kansas City, Fort Scott and Memphis Railway Company Leasehold and Auxiliary Companies' Bonds, Rentals, Sinking Fund and Miscellaneous (details as per page 31) amount to (year 1915)	5,306,000	<del>4.</del>	
	\$302,076,386	Total.  The fixed charges in connection with the Kansas City, Fort Scott and Memphis Railway Company Leasehold and Auxiliary Companies' Bonds, Rentals, Sinking Fund and Miscellaneous (details as per page 31) amount to (year 1915)	89

### Capitalization and Fixed Charges-Continued

B. Capitalization and Interest Charges of New Company

[fol. 362]

Upon retirement of the foregoing \$287,286,386 of securities, dealt with under the Plan, there will have been issued in respect thereof, or in connection with the extinguishment of liability thereon and for Cash Requirements of the Plan which includes provision for working capital, improvements, etc., the following new securities:

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Obligation
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Annual fixed interest charge

\$3,735,940.00 1,250,000.00		511,010.00	
\$93,398,500 Prior Lien Mortgage Bonds, Series A, 4% \$3,735,940.00 25,000,000 Prior Lien Mortgage Bonds, Series B, 5%, sold to provide cash requirements of the Plan 1,250,000.00	leaving undisturbed with bonds reserved under the Prior Lien Mortgage to take up same at or before maturity:	9,484,000 St. Louis & San Francisco Railway Company General Mortgage 5% and 6% Gold Bonds maturing 1931	Equipment Trust Certificates maturing after July 1, 1917 (about) Sundry Rentals and Sinking Funds (year 1915)
\$93,398,500 25,000,000		9,484,000	5,306,000

\$6,341,069.36

The Fixed Charges in connection with the Kansas City, Fort Scott and Memphis Railway Company Leasehold and Auxiliary Companies' Bonds, Rentals, Sinking Fund and Miscellaneous are as follows:  \$1,000,000 Birmingham Belt Railroad Company First Mortgage 4% Gold Bonds  25,835,000 Kansas City, Ft. Scott and Memphis Railway Company Refunding Mortgage 4% Gold Bonds  13,736,000 Kansas City, Fort Scott and Memphis Railroad Company Consolidated Mortgage 6% Bonds  1,606,000 Kansas and Missouri Railroad Company First Mortgage 5% Bonds  1,606,000 Current River Railroad Company First So,300 00  3,000,000 Kansas City, Memphis and Birmingham Railroad Company General Mortgage 4% 132,935 60  5,923,280 Kansas City, Memphis and Birmingham Railroad Company Income 5% Bonds  5,923,280 Kansas City, Memphis and Birmingham Railroad Company Income 5% Bonds		90	90	8	00	90	90	09	00
The Fixed Charges in connection with the Kansas City, Fort Scott and Memphis Railway Company Leasehold and Auxiliary Companies' Bonds, Rentals, Sinking Fund and Miscellaneous are as follows:  \$1,000,000 Birmingham Belt Railroad Company First Mortgage 4% Gold Bonds  25,835,000 Kansas City, Ft. Scott and Memphis Railroad Company Refunding Mortgage 4% Gold Bonds  13,736,000 Kansas City, Fort Scott and Memphis Railroad Company Consolidated Mortgage 6% Bonds  1,606,000 Kansas and Missouri Railroad Company First Mortgage 5% Bonds  2,000,000 Kansas City and Memphis Railway and Bridge Company First Mortgage 5% Gold Bonds  3,323,390 Kansas City, Memphis and Birmingham Railroad Company General Mortgage 4% Bonds  5,923,280 Kansas City, Memphis and Birmingham Railroad Company Income 5% Bonds		40,000	1,033,400	824,160	19,500	80,300	150,000	132,935	296,164
The F City, For hold and ing Fund \$1,000,000 25,835,000 13,736,000 3,000,000 3,323,39 3,323,38	ixed Charges in connection with the Kansas t Scott and Memphis Bailway Company Lease-Auxiliary Companies' Bonds, Rentals, Sinkland Miscellaneous are as follows:	0 Birmingham Belt Railroad Company First Mortgage 4% Gold Bonds		2					
	The F City, For hold and ing Fund	\$1,000,000	25,835,00	13,736,00	390,000	1,606,00	3,000,00	3,323,39	5,923,28

## Capitalization and Fixed Charges-Continued

35	89				80	92	1
\$2,817,120 32	\$9,158,189 68				\$4,544,389 08	\$13,702,578 76	
[fols. 363 & 364] Rentals and Sinking Fund under Kansas City, Ft. Scott and Memphis Lease, and miscellaneous (year 1915)  240,660 72	Total Fixed Interest Charges of New Company	· and	Contingent Charge Obligations	40,547,818 6% Cumulative Adjustment Mortgage Bonds \$2,432,869 08 35,192,000 6% Non-Cumulative Income Mortgage Bonds 2,111,520 00	Total Contingent Interest Charges of New Company	Total Interest Charges, Fixed and Contingent, of New Company	and the following amount of Stock:

6% Preferred Stock. Common Stock. Total.

7,000,000 48,480,000 \$264,408,318

	\$302,076,386.00	264,408,318 00	\$14,886,324 68	\$9,158,189_68 \$4,544,389_08	\$13,702,578 76
The lines of Chicago and Eastern Illinois Railroad Company and of New Orleans, Texas and Mexico Railroad Company and of New Orleans Terminal Company are not to be taken over by the New Company.	Capitalization of Old Company, exclusive of K. C., Ft. S. & M. System Bonds undisturbed (see page 30)	Capitalization of New Company, exclusive of K. C., Ft. S. & M. System Bonds un- disturbed (see above)	11	Fixed Interest Charges of New Company, including K. C., Ft. S. & M. System Bonds undisturbed (see above) Contingent Interest Charges of New Company (see above)	Total Interest Charges, Fixed and Contingent, of New Company (see above) \$13,702,578 76

### Earnings

The officials of St. Louis and San Francisco Railroad Company have certified that the Income Account of the Company for Four Years Ended June 30, 1915, after eliminating all Items in connection with Chicago and Eastern Illinois Railroad Stocks, the New Orleans, Texas and Mexico lines and New Orleans Terminal Company (which it is not intended to vest in the New Company) were as follows:

	Year ending June 30, 1912	Year ending June 30, 1913	Year ending June 30, 1914	Year ending June 30, 1915	Average of 4 years
Operating revenue	\$41,764,800.84	\$45,690,972.46	\$44,556,234.12	\$42,677,323.13	\$43,672,333.14
Revenue from operations other than trans-	235,560,89	359,317.57	367,334,57	297,349,58	339,865.65
Operating expenses, including taxes	\$42,100,363,73 30,667,171,89	\$46,050,290.03	\$44,923,568,69 35,419,814.82	\$42,974,572,71 31,875,648.06	\$44,012,198.79 32,682,792.45
Operating incomeOther income less hire of equipment	\$11,433,191,84 685,470,76	\$13,281,755.62 SS9,540.48	\$9,503,753.87 655,191.42	\$11,098,924.06 571,842.70	\$11,329,406.34 700,511.34
Total income	\$12,118,662,60	\$14,171,296.10	\$10,158,945.29	\$11,670,766.75	\$12,029,917.68
Add difference between rental paid to Frisco Construction Company (all of whose stock is owned by St. Louis and San Francisco Railroad Company) and the interest on Construction Company Equipment Certificates outstanding at the time and which are to be retired or provided for in the plan.	N. 208. IN	48,733.30	51,082.79	29,084.12	38,010.30
	\$12,199,971,44	\$14,220,029.40	\$10.210,028.08	\$11,641,682.63	\$12,067,927.88
Add for estimated net earnings of Quanah. Acme and Pacific Railway					75,000.00
					\$12,142,927.84

\*Deduct.

The Receivers advise that they charged out during the year ended June 30, 1915, for equipment retired, including depreciation and obsolescence, a total of \$1,977,700.52, of which \$1,426,827.30 was charged to operating expenses and \$550,873.22 to Profit and Loss.

### Maintenance Expenditures

The Receivers advise that large expenditures have been made during the Receivership on account of Maintenance of Way and Maintenance of Equipment in order to improve the property generally, and have furnished the following table showing amount (stated in thousands) expended and charged to operating expensés during the last four fiscal years:

	Mainte- nance of way	Maintenance of equipment	Total
Year ending June 30,	\$5,118.00	\$5,521,000	\$10,639,000
Year ending June 30,			11,846,000
Year ending June 30.		7,492,000	15,254,000
Your ending June 30.		7,162,000	13,250,000

Amount charged to Operating Expenses for Maintenance of Way and Equipment during the period of Receivership, as compared with previous years:

Yearly average	for two years ending June 30, 1913 (prior to	* * * * * * * * * * * * * * * * * * * *
Receivership)	for two years ending June 30, 1915 (during	1,242,000
Receivership)	for two years ending June 30, 1313 (during	4,252,000

Upon retirement of the securities called for deposit under the Plan of Reorganization, the Prior Lien Mortgage Bonds, the Adjustment Mortgage Bonds and the Income Mortgage Bonds will be secured by mortgage in the relative priority stated, on the following lines of railroad including equipment (either directly or through pledge of securities where impracticable to obtain a direct lien), viz:

	Miles first main track owned		Miles second and side track		
St. Louis, Mo., to Oklahoma City,					
Okla	543	09	279	17	
Sapulpa, Okla., to Texas State Line	192	65	59	30	
Monett, Mo., to Red River	286	13	65	32	
Pierce City, Mo., to Ellsworth, Kas.	323	80	68	80	
Springfield, Mo., to Kansas City,					
Mo	185	69	47	95	
Beaumont, Kas., to Blackwell, Okla	79	73	9	78	
Girard, Kas., to Galena, Kas.	46	93	34	15	
Oronogo, Mo., to Joplin, Mo.	9	32	6	60	
Springfield, Mo., to Chadwick, Mo.	34	86	6	78	
Cuba Junction, Mo., to Salem, Mo.					
and Branches	59	54	12	00	
Rogers, Ark., to Grove, Okla.	47	16	3	59	
Fayetteville, Ark., to Pettigrew,					
Ark.	41	32	4	65	
Jenson, Ark., to Mansfield, Ark.		34	19	44	
Pittsburg, Kas., to Weir City, Kas.,					
and Mines	10	48	8	14	
Springfield Connecting Ry.	2	93	1	61	
Granby, Mo., Granby Mines		50	1	09	
Blackwell, Okla., to South Bank					
Red River	238	68	41	14	
Oklahoma City, Okla., to South					
Bank Red River	174	85	27	27	
Hope, Ark., to Ardmore, Okla.	223	28	41	91	
Scullin, Okla., to Sulphur Springs,					
	8	72	1	20	
Okla Mead Junction, Okla., to Platter,	O				
Okla. (now Kiersey, Okla., to	0	24	1	09	
Texas Junction, Okla.)	27	- M.E.	A.	50	

	Miles first main track owned	Miles second and side track
Fayetteville, Ark., to Okmulgee,	tiuca on an	
Okla.	143.90	22.08
A. V. & W. Junction to Avard, Okla. Southeast Junction, Mo., to Luxora,	175 25	31 06
Southeast Junction, Mo., to Luxora,	241.70	78.45
Ark. Nash, Mo., to Hoxie, Ark.	121.00	17.12
Mingo, Mo., to Hunter, Mo.	45.80	3.72
Hayti, Mo., to Grassy Bayou, Mo. (via Caruthersville) Gulf Junction, Mo., to Leachville,	15.70	3.31
Ark.	118.20	18.18
Clarkton, Mo., to Malden, Mo.	7.30	1 69
Kennett, Mo., to Hayti, Mo.	18.30	1 56
Wardell, Mo., to Deering, Mo.	12 10	.98
Zalma, Mo., to Aquilla, Mo.	18.40	. 64
Van Duzer, Mo., to Gibson, Mo.	56.00	5.76
Talipoosa, Mo., to Wardell, Mo.	10.70	19
Fort Worth, Tex., to Menard, Tex.	223 44	42.48
Brownwood, Tex., to May, Tex. Texas State Line to Fort Worth,	17.65	1 59
Tex. [fol. 368] Red River, Tex., to Ver-	63.89	25.32
non, Tex.	12.75	1 86
Red River, Tex., to Quanah, Tex	8.68	3 83
Red River, Tex., to Paris, Tex.	16.94	8.36
	3,865 94	1,009.16
and in case Quanah, Acme & Pacific Railway is included in New Com- pany, Quanah, Tex., to MacBain,	To no	
Tex.	78.92	***************************************
Total .	3,944 86	1,009.16

In addition, trackage is used over about 200 miles of other roads.

subject, however, as to the property embraced therein to the lien of \$9,484,000 St. Louis and San Francisco Railway Company General Mortgage 5% and 6% Gold Bonds, due

1931 (part of \$20,100,000, whereof \$10,614,000 will eventually be deposited under the Prior Lien Mortgage or cancelled, the remaining \$2,000 having already been cancelled), and \$5,306,000 Equipment Trust Obligations, maturing after July 1, 1917, to take up which, at or before maturity, Prior Lien Mortgage Bonds to a like principal amount (\$14,790,000) are reserved under the Prior Lien Mortgage.

In addition thereto, the New Mortgages in the order of their relative priority will be a lien on the New Company's leasehold interest in the Kansas City, Fort Scott and Memphis Railway Company, on the stocks, preferred and common, of that company, and on the New Company's interest in the various terminal companies operated jointly with other railroad companies.

### Reorganization Agreement

Agreement, dated the first day of November, 1915, between J. & W. Seligman & Co. and Speyer & Co., respectively co-partnerships, hereinafter called the Reorganization Managers, parties of the first part, and Holders of the Bonds, Trust Certificates and Stock hereinafter mentioned, who shall become parties to this Agreement as hereinafter provided, their successors and assigns, and the Holders of Certificates of Deposit issued under or subject to the Plan, hereinafter collectively called Depositors, parties of the second part.

In consideration of the mutual benefits to be derived from the performance hereof and of the conditions and promises herein contained and for other valuable considerations, the parties hereto agree, each of the Depositors agreeing with each of the other Depositors, as follows:

First. The accompanying Plan is and shall be taken to be a part of this Agreement with the same effect as though each and every provision thereof had been embodied herein and said Plan and this Agreement shall be read as parts of one and the same paper.

[fol. 369] Second. The following bonds, trust certificates and stock may be deposited under the Plan of this Agreement on the terms stated herein and in the Plan:

St. Louis and San Francisco Railroad Company:

Refunding Mortgage Four Per Cent. Gold Bonds (hereinafter called Refunding Mortgage Bonds).

General Lien 15-20 Year Five Per Cent. Gold Bonds

(hereinafter called General Lien Bonds).

Consolidated Mortgage Four Per Cent. Gold Bonds.

Southwestern Division First Mortgage Five Per Cent. Gold Bonds.

Central Division First Mortgage Four Per Cent. Gold

Bonds.

Northwestern Division First Mortgage Four Per Cent. Gold Bonds.

St. Louis and San Francisco Railway Company:

Trust Mortgage Five Per Cent. Gold Bonds of 1887.
Trust Mortgage Six Per Cent. Gold Bonds of 1880.
Missouri and Western Division First Mortgage Six Per Cent. Gold Bonds.

St. Louis, Wichita and Western Railway Company: First Mortgage Six Per Cent. Gold Bonds.

St. Louis and San Francisco Railroad Company:

Kansas City, Fort Scott & Memphis Railway Company Guaranteed 4% Preferred Stock Trust Certificates.

Muskogee City Bridge Company:

First Mortgage Five Per Cent. Gold Bonds.

St. Louis, Memphis and Southeastern Railroad Company:

First Mortgage Four Per Cent. Gold Bonds.

[fol, 370] Chester, Perryville and Ste. Genevieve Railway Company:

First Mortgage Five Per Cent. Gold Bonds.

Pemiscott Railroad Company:

First Mortgage Six Per Cent. Gold Bonds.

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Kennett & Osceola Railroad Company:

First Mortgage Six Per Cent. Gold Bonds.

Southern Missouri and Arkansas Railroad Company:

First Mortgage Five Per Cent. Gold Bonds.

Fort Worth and Rio Grande Railway Company: First Mortgage Four Per Cent. Gold Bonds.

Quanah, Acme and Pacific Railway Company: First Mortgage Six Per Cent. Gold Bonds.

St. Louis and San Francisco Railroad Company: First Preferred Stock. Second Preferred Stock. Common Stock.

Third. Frederick Strauss, James N. Wallace, Alexander J. Hemphill, Edwin G. Merrill, Harry Bronner, C. W. Cox and Breckinridge Jones, acting as a Committee under an Agreement dated June 20, 1914, of Holders of Refunding Mortgage Bonds (hereinafter called the Refunding Committee,) have adopted and approved this Plan and Agreement in the exercise of the powers conferred upon said Committee by said Agreement dated June 20, 1914 (hereinafter called the agreement of June 20, 1914).

A copy of this Plan and Agreement has been, or will be, lodged with each of the Depositaries under the Agreement of June 20, 1914, and notice of the fact of the adoption and approval thereof by the Refunding Committee in accordance with the provisions of Article Second of the Agreement of June 20, 1914, will be published at least twice in each week for two successive weeks in the Sun and the New York Times, n-wspapers of general circulation published in the Borough of Manhattan, City, County and State of New York; in the Boston Herald, a newspaper of general circulation published in the City of Boston, Massachusetts; in [fol. 371] the St. Louis Globe-Democrat, a newspaper of general circulation published in the City of St. Louis,

Missouri; in the Boersen-Courier and the Berliner Boersen Zeitung, newspapers of general circulation published in Berlin, Germany; and in the Handelsblad, a newspaper of general circulation published in Amsterdam, Holland, or in other newspapers as provided in the Agreement of June 20, 1914. Every holder of a certificate of deposit under the Agreement of June 20, 1914, who shall not have exercised. within the period of thirty days after the first publication of such notice, the right of withdrawal conferred by said agreement, shall be conclusively and finally deemed for all purposes to have irrevocably waived the right of withdrawal given to such holder by said agreement, and this Plan and Agreement shall be binding on all holders of certificates of deposit who shall not so have withdrawn their deposited bonds, all of whom shall be conclusively and finally deemed for all purposes to have assented to this Plan and Agreement and the terms thereof whether they receive actual notice or not and be irrevocably bound and concluded by the same, but notwithstanding, the rights of such holders of certificates of deposit shall be such only as are conferred by this Plan and Agreement and shall be subject to compliance with such terms as this Plan and Agreement may impose as conditions of participation in the benefits hereof, and no holder of any certificate of deposit issued under the Agreement of June 20th, 1914, who shall, in the manner authorized by said agreement, withdraw from said agreement or from this Plan and Agreement, shall acquire or have any rights under this Plan and Agreement. Holders of certificates for Refunding Mortgage Bonds deposited under the Agreement of June 20, 1914, who shall not exercise said right of withdrawal will be entitled to the benefits of this Plan and Agreement without the issue of new certificates.

Holders of Refunding Mortgage Bonds not heretofore deposited under the Agreement of June 20, 1914, may become entitled to the benefits of this Plan and Agreement by depositing their said bonds and coupons with some one of the Depositaries under the Agreement of June 20, 1914, on or before April 3, 1916, or such later date as the Reorganization Managers may from time to time determine as hereinafter provided. Such holders shall upon such deposit receive, in respect of the bonds so deposited, certifi-

cates of deposit issued under the Agreement of June 20, 1914.

[fol. 372] Speyer & Co., acting under a Bondholders' Agreement dated May 28, 1913, between themselves and Holders of General Lien Bonds (hereinafter called the General Lien Representatives), have adopted and approved this plan and Agreement in the exercise of the powers conferred upon them by said Bondholders' Agreement dated May 28, 1913 (hereinafter called the Agreement of May 28,

1913).

A copy of this Plan and Agreement with their written adoption and approval thereof has been, or will be, lodged by the General Lien Representatives with Bankers Trust Company of New York, the Depositary under the Agreement of May 28, 1913, for inspection by holders of certificates of deposit thereunder, and notice of the fact of such adoption and approval and of the lodging of a copy thereof with said Depositary in accordance with the provisions of Article Fifth of the Agreement of May 28, 1913, will be published at least twice in each week for three consecutive weeks in two n-wspapers published in each of the cities of New York, London, Frankfort, Berlin and Amsterdam. All holders of certificates of deposit under the Agreement of May 28, 1913, who before the date specified in such advertisement (which date shall be at least four weeks after the first publication of such advertisement) shall not have exercised the right of withdrawal conferred by the Agreement of May 28, 1913, shall be deemed to have assented to this Plan and Agreement and shall be bound thereby without further act or notice, but, notwithstanding, the rights of such holders of certificates of deposit shall be such only as are conferred by this Plan and Agreement and s-all be subject to compliance with such terms as this Plan and Agreement may impose as conditions of participation in the benefits hereof, and no holder of any certificate of deposit issued under the Agreement of May 28, 1913, who shall in the manner authorized by said agreement, withdraw from said agreement or from this Plan and Agreement, shall acquire or have any rights under this Plan and Agreement. Holders of certificates of Bankers Trust Company for General Lien Bonds deposited under the Agreement of May 28, 1913, who shall not exercise said right of withdrawal will be entitled to the benefits of this Plan and Agreement without the issue of new certificates.

Holders of General Lien Bonds not heretofore deposited under the Agreement of May 28, 1913, may become entitled to the benefits of this Plan and Agreement by depositing their said bonds and coupons with the Depositary under the Agreement of May 28, 1913, on or before April 3, 1916, or [fol. 373] such later date as the Reorganization Managers may from time to time determine as hereinafter provided. Such holders shall upon such deposit receive, in respect of the bonds so deposited, certificates of deposit of Bankers Trust Company issued under the Agreement of May 28, 1913.

This Plan and Agreement has been prepared and adopted by the Committee of Defense of the French Holders of General Lien Bonds, French Series, and by the Office National des Valeurs Mobilieres, Paris, under whose direction and auspices said Committee of Defense was established, and various of such holders (1) have executed a power of attorney to L. C. Krauthoff, Esq., (hereinafter called the Attorney-in-fact), a copy of the form whereof is annexed to and made a part of the Instrument of Designation, dated August 5, 1915, of the Bankers Trust Company, as Depositary for such bonds, and (2) have made deposit of said bonds subject to such power of attornev with Bankers Trust Company, as Depositary for the Attorney-in-fact. The written assent of the Attorney-infact to this Plan and Agreement filed with the Depositary for the Attorney-in-fact, and the written direction of the Attorney-in-fact to said Depositary to hold the bonds and coupons at any time received by said Depositary of the Attorney-in-fact subject to this Plan and Agreement, and to the order of the Reorganization Managers for the purposes of carrying the Plan and Agreement into effect, shall operate as the assent to this Plan and Agreement by all holders of certificates of deposit at any time issued by said Depositary, or by any of its agents, including The Equitable Trust Company of New York (Paris Branch); and all such holders shall be bound by such assent so expressed without further act or notice. The rights of such holders of certificates, however, shall be such only as are conferred by this Plan and Agreement, and shall be subject to compliance with such terms as this Plan and Agreement may impose as conditions of participation in the benefits hereof. Holders of such certificates of deposit shall be entitled to the benefits of this Plan and Agreement without the issue of new certificates.

Holders of General Lien Bonds, French Series, not heretofore so deposited, may become entitled to the benefits of this Plan and Agreement by depositing with the Depositary designated by the Attorney-in-fact, or one of its agents, on or before April 3, 1916, or such later date as the Reorganization Managers may from time to time determine as hereinafter provided, their said bonds and coupons, [fol. 374] accompanied by a properly executed power-ofattorney to the Attorney-in-fact. Such holders shall upon such deposit receive, in respect of the bonds so deposited, certificates of deposit of said Depositary issued pursuant and subject to the powers conferred by said power of attorney, and stamped as assenting to this Plan and Agreement.

Holders of all other securities in Article Second hereof mentioned, except stock of St. Louis and San Francisco Railroad Company, may become entitled to the benefits of this Plan and Agreement by depositing their securities with Central Trust Company of New York, as Depositary, at its office in the City of New York, on or before April 3, 1916, or such later date as the Reorganization Managers may from time to time determine as hereinafter provided.

Pursuant to the arrangement with a Purchase Syndicate as stated in the Plan, holders of stock of St. Louis and San Francisco Railroad Company, who shall comply with the terms and conditions of this Plan and Agreement and be entitled to the benefits hereof, may purchase from said Purchase Syndicate, new bonds and common stock (trust certificates) at the price and otherwise on the terms in this Plan and Agreement prescribed. Holders of said stock may become entitled to such right of purchase by depositing their said stock with Guaranty Trust Company of New York, the Depositary for that purpose, at its office in the city of New York, on or before April 3, 1916, or such later date as the Reorganization Managers may from time to time determine as hereinafter provided, and making payment at the time of deposit of \$5 in respect of each share

deposited. No stock will be received for deposit without such payment, which will be receipted for by said Depositary on the certificates of deposit. Any depositor of stock who may desire to prepay in accordance with the Plan, the entire purchase price of the securities which such holder shall be entitled to purchase under the Plan must make his election so to do at the time of such deposit and such election will be appropriately noted on his certificate

of deposit.

All securities deposited must be in negotiable form and all stock certificates and registered bonds deposited be either endorsed in blank for transfer or accompanied by proper transfers in blank duly executed. The Refunding Mortgage Bonds, if in coupon form, must bear the coupon maturing July 1, 1914, and all subsequent coupons; the General Lien Bonds, if in coupon form, must bear the coupon maturing May 1, 1914, and all subsequent coupons; all other [fol. 375] securities must bear all appurtenant coupons (or claims for interest, if registered) maturing after July, 1, 1916. All securities (including in that term, whenever used in the Plan or in this Agreement, stock and trust certificates therefor unless the context otherwise requires) must be properly stamped for transfer in New York.

Every holder of a certificate of deposit under the Agreement of June 20, 1914, or the Agreement of May 28, 1913 who shall not have exercised any right of withdrawal under the agreement under which such certificate of deposit was issued, and every holder of a certificate of deposit issued by the Depositary for the Attorney-in-fact or any of its agents, and every holder of a certificate of deposit hereunder, and every recipient of any such certificate, shall thereby become a party to this Plan and Agreement with the same force and effect as though an actual subscriber hereto and shall be embraced with the term Depositors

whenever used in this Agreement.

Holders of securities who do not become parties hereto in the manner herein provided, and within the periods fixed therefore, will not be entitled to deposit their securities or become parties to this Agreement on to share in the benefits of the Plan or of this Agreement, and shall acquire no rights hereunder, except upon obtaining an express written consent of the Reorganization Managers; and the Reorganization Managers shall have full power in their discretion, from time to time, and in general or in particular instances, and upon such general or special terms and conditions as they may see fit, to withhold or give such consent, to extend the time for making any deposits of any class of securities under this Plan and Agreement, to admit as parties to, and to participation in, the Plan and this Agreement, as Depositors hereunder, the holders of any of the securities mentioned in Article Second hereof or any other securities dealt with or affected by the Plan. and in like manner to permit the holders of such securities to become parties hereto without the actual deposit of securities; and all security holders so becoming parties shall be embraced within the term Depositors whenever used in this Agreement. The Reorganization Managers in like manner and with like effect may, upon such terms and conditions as they may determine, accept for deposit hereunder bonds without such interest coupons appertaining thereto as they may specify, and also may accept for deposit hereunder such interest coupons without the bonds to which they appertain.

[fol. 376] The term deposited securities, whenever used in this Agreement, shall include all securities directly deposited hereunder or represented by a certificate, the holder of which shall, as in any manner, herein provided, have

assented to this Plan and Agreement.

Reorganization of St. Louis and San Francisco Railroad

Modification of Plan and Agreement Dated November 1, 1915

The undersigned, J. & W. Seligman & Co. and Speyer & Co., as Reorganization Managers under the Plan and Agreement dated November 1, 1915 for the reorganization of the St. Louis and San Francisco Railroad Company, hereby modify said Plan and Agreement by adding to Article Third of said Agreement the following clause:

"The Reorganization Managers may from time to time, upon such terms and conditions as they may determine, permit holders of certificates of deposit for stock not bearing notice of election to prepay the entire purchase price of

bonds and stock trust certificates which they are entitled to purchase under the Plan to elect to prepay such purchase price and exchange their said certificates of deposit for certificates of deposit bearing notation of such election."

In Witness Whereof, said Reorganization Managers have subscribed this instrument as of the 27th day of June 1916.

J. & W. Seligman & Co., Speyer & Co., Reorganization Managers.

Fourth. All Depositors, except as herein otherwise provided, shall receive certificates of deposit in form to be prescribed by the Reorganization Managers specifying the security deposited, and the holders of such certificates of deposit shall be entitled (subject to any provisions contained in such certificates) to the rights and benefits, and only to the rights and benefits, specified in this Plan and Agreement as accruing to the holders of securities of the character represented by such certificates, respectively, or granted by the Reorganization Managers pursuant to the powers conferred upon them, but only upon compliance with the terms and conditions imposed by the Plan and this Agreement.

Certificates of deposit issued hereunder, or under the Agreement of June 20, 1914, or under the Agreement of May 28, 1913, or by the Depositary for the Attorney-infact or any of its agents, shall be transferable only subject to the terms and conditions of this Plan and Agreement and in such manner and on such conditions as the Reorganization Managers shall approve, and upon such transfer, all rights of the transferror under this Plan and Agreement and in respect of the deposited securities represented by the certificate of deposit transferred, and in respect of any sums paid in respect of any stock represented by such certificate, and all rights under such certificate, shall pass to the transferee, and the transferees and holders of such certificates of deposit, shall, for all purposes, be substituted in place of the prior holders, subject to the Plan and this All such transferees, as well as the original holders of certificates of deposit issued hereunder or under the Agreement of June 20, 1914, or under the Agreement of May 28, 1913, or by the Depositary for the Attorneyin-fact or any of its agents, shall be embraced within the term Depositors whenever used herein. Each such certificate of deposit may be treated by the Reorganization Managers and by the Depositaries as a negotiable instrument, and the holder for the time being, or if registered, the registered holder for the time being, may be deemed to be the absolute owner thereof and of all rights of the original Depositor of the securities in respect of which the same was issued, and neither the Depositaries nor the Reorganization Managers shall be affected by any notice to

the contrary.

[fol. 377] All holders of certificates of deposit issued hereunder in respect of stock of St. Louis and San Francisco Railroad Company bearing notation of election to prepay the entire purchase price of bonds and stock trust certificates which they are entitled to purchase under the Plan, severally and respectively agree, on behalf of themselves and their respective transferees and assigns. that prompt payment of the entire purchase price of such bonds and stock trust certificates is an essential condition to the acquisition by them of Fully Paid Subscription Certificates or such bonds and stock trust certificates and that any holder of such a certificate of deposit who shall fail to make such payment within the period fixed by the Reorganization Managers shall forfeit all rights to obtain Fully Paid Subscription Certificates or to purchase bonds and stock trust certificates and all rights of purchase under the Plan, as well as the deposited stock represented by such certificate of deposit and all cash theretofore paid under the Plan or this Agreement in respect thereof or otherwise, and shall cease to have any rights whatsoever under this Plan and Agreement and forthwith upon such failure such certificate of deposit shall become null and void and of no effect. The Reorganization Managers may, however, in their discretion, from time to time, in general or particular instances and upon such general or special terms and conditions as they may see fit, enlarge or extend the time within which holders of such certificates of deposit may make such prepayment or may waive any forfeiture in respect thereof.

Upon compliance with all the terms and conditions of this Plan and Agreement, Depositors shall be entitled to receive upon the consummation of the Plan and upon surrender of their certificates of deposit in negotiable form, the new securities (but only as and when issued and ready for delivery) and any cash to which they shall respectively be entitled pursuant to the terms and provisions of this Plan and Agreement (including in the term new securities whenever used in this Agreement, Purchase Warrants and

Fully Paid Subscription Certificates).

The term Depositor or the term certificate holder, whenever used herein, is intended and shall be construed to include not only persons acting in their own right, but also trustees, guardians, committees, agents and all persons acting in a representative or fiduciary capacity, and those represented by or claiming under them and partnerships, associations, stock companies and corporations. No rights [fol. 378] hereunder shall accrue in respect of any securities herein mentioned unless, nor until, the same shall have been subjected to the control of the Reorganization Managers and to the operation of this Plan and Agreement as herein provided.

Fifth, Each and every Depositor hereby requests the Reorganization Managers to endeavor to carry the Plan into practical operation in its entirety or in part, to such an extent and in such manner and with such additions, exceptions and modifications as the Reorganization Managers shall deem to be for the best interests of the Depositors, or of the properties finally embraced in the Plan. Each and every Depositor for himself, and not for any other of them, does hereby sell, assign, transfer and set over to the Reorganization Managers, as joint tenants and not as tenants in common, and to the survivor and survivors of them and to their successors, each and every bond, trust certificate, share of stock, or other security or obligation or evidence thereof, deposited hereunder or represented by a certificate, the holder of which shall, as in any manner herein provided, have assented to this Plan and Agreement, and hereby agrees that the Reorganization Managers shall be, and they hereby are, vested with the legal title to, and all the power and authority of owners of, all bonds, trust certificates, stock and other securities and obligations deposited hereunder or represented by such certificates, and of all other securities,

obligations and property of every nature whatsoever which may be acquired by the Reorganization Managers pursuant to the provisions of the Plan or of this Agreement. Depositors respectively agree at any time and from time to time on demand of the Reorganization Managers to execute and deliver any and all further transfers, assignments, authorizations, powers or writings required for vesting the ownership of such securities and property in the Reorganization Managers or its nominees and also all certificates which may be required by the United States Income Tax Law and the regulations of the Treasury Department for the collection of coupons and interest on the deposited securities or any of them. The Reorganization Managers shall have and may exercise in respect of the securities deposited under or subject to this Plan and Agreement all powers conferred by the Agreement of June 20, 1914, on the Refunding Committee and by the Agreement of May 28, 1913, on the General Lien Representa-Without prejudice to the general power and authority herein granted, the Depositors hereby severally ir. revocably authorize and empower the Reorganization Managers to transfer such bonds, shares of stock or other [fol, 379] securities or obligations or property into their own names as Reorganization Managers, or into the name of their nominee or nominees; to procure or consent to any corporate action by St. Louis and San Francisco Railroad Company (hereinafter called the Railroad Company) or any of its constituent, controlled, subsidiary or lessor companies; to sign and file any written consent or instrument required or permitted by law to be signed or filed: to demand, receive and collect all moneys that may be due and owing to or payable in respect of any deposited securities or any securities acquired by the Reorgization Managers pursuant to the provisions of the Plan or this Agreement, and whether for interest, principal, dividends or otherwise; to elect, or request and cause any trustee or trustees under any mortgage or trust indenture securing the payment of any such securities to elect, to have the principal of such securities become due and payable, and at pleasure to revoke or withdraw such election or cause the same to be revoked or withdrawn; to request, direct or instruct any trustee or trustees of any

such mortgage or trust indenture to prosecute foreclosure or take other proceedings for the enforcement thereof or otherwise, or for the enforcement or any such securities. or to exercise the powers or any of them conferred by such mortgage or trust indenture; to confirm and give to such trustee or trustees all such powers as in the judgment of the Reorganization Managers may be advantageous in carrying out the Plan; to make all such other requests, directions, instructions or demands upon any such trustee or trustees or otherwise as the Reorganization Managers may deem proper; to remove any such trustee or to appoint a new trustee to succeed any trustee so removed or resigning or otherwise disabled from acting; to take or institute, or cause to be taken or instituted, or to become parties to, or excercise control over, all proceedings, legal or otherwise, give such directions, execute such papers and do or cause to be done such acts as the Reorganization Managers may consider judicious to enforce any security for, or procure the payment, of any deposited securities or otherwise to protect the rights and interest of the Depositors, or in which the Depositors may be interested, or for any of the purposes of the Plan or of this Agreement, including the right to apply for receivers, or the removal of receivers and the substitution of others receivers, or for the termination of any receivership and the delivery of any property to its owners; to discontinue or cause or consent to the discontinuance of, any actions or legal proceedings whether instituted by the Reorganization Managers or by others; to enter into settlement of any litigation now or [fol. 380] at any time existing or threatened in whole or in part, with plenary power to enter into arrangements for decrees or orders for facilitating or hastening the course of litigation, or in any way to promote the purposes of this Plan and Agreement; to call or waive notice, of and to attend, and, either in person or by proxy, to vote at, any and all meetings of bondholders or stockholders or creditors of any corporation however convened; to terminate or to seek to dissolve or modify any trust or lease, in whole or in part, to apply for the determination of the validity thereof, or for removal of any trustees or the substitution of other trustees, or to take any other steps in respect of any trust or lease or under any provi-

sion thereof; to purchase or sell at such prices as they shall see fit, or otherwise deal in or with, or, upon such terms and conditions as in their discretion they may determine, to pay, compromise, settle or acquire any securities, obligations or indebtedness of, or claims against. the Railroad Company or any of its constituent, controlled. subsidiary or lessor companies, or its receivers, or claims constituting a lien, directly or through securities, on any part of the railroad system of the Railroad Company, or subject to any mortgage or trust indenture securing the payment of any deposited securities, or in which the Railroad Company may have any interest, direct or indirect. and, in general, any securities, obligations, indebtedness or claims which the Reorganization Managers may deem advisable, and to use for any such purpose any securities contemplated by the Plan and not specifically appropriated by the Plan to other purposes, or any moneys coming into their hands; to enter into agreements with the holders. or any committee representing the holders, of any such securities, obligations, indebtedness or claims for the deposit thereof under the Plan and this Agreement or under the Plan and any other agreement which the Reorganization Managers may approve for the purpose, and to arrange for the payment in whole or in part of the compensation and expenses of any such committee; to have and exercise such powers in respect to all securities, obligations, indebtedness and claims so subjected to the Plan as they are authorized to exercise in respect to the deposited securities; to enter into agreements for the acquisition of, and to acquire on such terms as they may see fit, any lines of railroad or other property of any kind or nature whatsoever in the judgment of the Reorganization Managers advantageous to the New Company or for any of the purposes of this Plan and Agreement; to cause to be listed upon the New York Stock Exchange or elsewhere, any of the certificates of deposit issued hereunder and any of the new securities contemplated by the Plan; to [fol. 381] pay the expenses of any such listing, and any taxes, fees or charges in connection therewith: to pay or discharge any taxes, fees or governmental charges, domestic or foreign, necessary or expedient for or in connection with the deposit, assignment or transfer under the

Plan or this Agreement, or in pursuance thereof, of any securities, and any taxes, fees or charges imposed by any public authority wherever situated, domestic or foreign, in respect of the authorization, creation, issue or distribution of any of the new securities or otherwise in connection with the carrying out of the Plan and this Agreement; from time to time and upon such terms and conditions as the Reorganization Managers may determine, to borrow, or by guaranty or by the sale of new securities to be created or otherwise to obtain, money for any of the purposes of the Plan or this Agreement, including such sums as the Reorganization Managers may deem expedient to provide for the New Company; to charge or pledge any deposited securities, any property acquired by the Reorganization Managers pursuant to the provisions of the Plan or of this Agreement or any new securities to be issued, for the payment of any moneys borrowed or indebtedness or liability incurred; in case of any such borrowing, whether upon pledge or not, to give to the lender the promissory note or notes of the Reorganization Managers for the sums borrowed: to direct in writing the Depositary for any securities to hold the securities deposited with it and any other property, or any designated part thereof, as security for the repayment of any moneys advanced or to be advanced in accordance with this Agreement, in which case such securities and other property shall be, and shall be held by such Depositary as, security for such advance with the same effect as if they were actually deposited with the person making such advance as security for the payment thereof; to give all bonds of indemnity or other bonds, and to charge therewith the deposited securities, any property acquired by the Reorganization Managers pursuant to the provisions of the Plan or of this Agreement or new securities to be issued, or any part thereof; to do whatever, in the judgment of the Reorganization Managers, may be necessary to promote or to procure joint or separate sales of any property herein co cerned, wherever situated; to adjourn the sale of any property, or any portion or lot thereof at discretion; to bid, or to refrain from bidding, at any sale, either public or private, either in separate lots or as a whole, for any property or any part thereof, whether or not owned, controlled or covered by any deposited security, including or excluding any particular rolling stock, line or railway or other property, real or personal, and at, before or after any [fol. 382] such sale to arrange and agree for the resale of any portion of the property which the Reorganization Managers may decide to sell rather than to retain: to elect not to take any portion of any property purchased at any such sale; to hold any property purchased by the Reorganization Managers either in their names or in the name of their nominee or nominees, and to apply any deposited securities or any property acquired by the Reorganization Managers under the provisions of the Plan or of this Agreement, in satisfaction of any bid or towards obtaining funds for the satisfaction thereof, it being understood that the term property, whenever used in this Plan and Agreement, includes franchises. The amount to be bid or paid by the Reorganization Managers for any property shall be absolutely discretionary with them; and, in case of the sale to others of any property, the Re-organization Managers may receive, out of the proceeds of such sale or otherwise, any dividend in any form accruing on any securities deposited under or otherwise subjected to the Plan and this Agreement. Nothing in the Plan or this Agreement contained shall be construed to require the Reorganization Managers to acquire the stock, bonds or property of New Mexico and Arizona Land Company or to require them to acquire any property of the Railroad Company or of any of its constituent, controlled, subsidiary or lessor companies, the acquisition of which they may not deem advisable.

Sixth: The Réorganization Managers may procure the organization of one or more new companies wherever in their discretion they may determine, or may adopt or use any existing or future companies, and may cause to be made such consolidations, leases, sales or other arrangements, and may make such conveyances or transfers of any properties or securities acquired by the Reorganization Managers, and take such other steps as the Reorganization Managers may deem proper for the purpose of creating the new securities provided for in the Plan and carrying out all or any of the provisions thereof. They may cause the

ownership of all or any property of the New Company to be either a direct ownership or ownership through bonds or shares of stock, or both, of any other company, and may cause any mortgage or mortgages securing bonds of the New Company to be either a direct lien upon any particular property, or a lien upon the bonds or shares of stock, or both, of any company owning such property. They may prescribe the form of all securities, charters, by-laws, mortgages, trust certificates and all other instruments at [fol. 383] any time to be issued, filed or entered into in connection with the carrying out of the Plan. They may create and provide for all necessary trusts, and may nominate and appoint trustees thereunder, excepting that the Voting Trustees shall be appointed as stated in the Plan. So far as the reorganization or the issue of the securities or stock under the Plan may be subject to the approval or authorization of any public utilities or public service commission in any state in which any of the property to be acquired by the New Company is situated or in which the Reorganization Managers may in their discretion determine to organize the New Company, or of any other commission having authority in the premises, the amount of capitalization to be issued in the reorganization may be reduced by such amount as the Reorganization Managers may in their discretion determine, in order to comply with the order of, or to obtain the authorization or approval of, any such commission. In the event of such reduction of capitalization. the whole of such reduction shall be made in Common Stock and in the amount of stock trust certificates to be sold to the Purchase Syndicate as provided in the Plan, and by it in turn offered to the three classes of depositing stockholders of the Railroad Company; the amounts of stock trust certificates deliverable, respectively, under the three classes of Purchase Warrants and Fully Paid Subscription Certificates being reduced by an equal percentage. The Reorganization Managers may proceed under this Plan and Agreement or any part thereof with or without foreclosure and in case of foreclosure may exercise any power, either before or after foreclosure sale; and in every case all the provisions of this Plan and Agreement shall equally apply to and in respect of any physical properties embraced under the reorganization and to and in respect of any securities representing any such property, it being intended that for all purposes any such property and any security representing such property may be treated by the Reorganiza. tion Managers as substantially identical. In case any senarate plan shall in the opinion of the Reorganization Mana. gers become expedient to effect the reorganization of any subordinate or other company, or as to any property constituting a part of the system of the Railroad Company, the Reorganization Managers may promote and participate in any such reorganization and may deposit thereunder any securities thereby affected. The Reorganization Managers may make equitable provision for any case of lost or destroved securities and provide for and make such issues of fractional scrip as shall be necessary appropriately to represent any fractional interest in the new securities, and [fol. 384] may in their discretion settle for and adjust any such fractional interests in cash, and they may issue temporary or interim certificates representing new securities. They may also in their discretion set apart and hold in trust, or place in trust with any trust company, any part of the new securities to be issued, and cash which may be received from sales of new securities, or otherwise, as they may deem judicious for the purpose of securing the application thereof for any of the purposes of this Plan and The Reorganization Managers may receive and dispose of, or allow to be received or disposed of by any other person, firm or corporation, in accordance with any of the provisions of the Plan and of this Agreement. the new securities to be created, and they may vote or cause or allow any person, firm or corporation to vote upon any or all stock until the same shall have been transferred or distributed as contemplated in the Plan, to those entitled ultimately to receive the same. The Reorganization Managers may negotiate and contract with any persons, firms or corporations for the acquisition of property or equipment for use in the operation of the railroads or property to be acquired by the New Company under the Plan or for obtaining or granting or effecting running powers, terminal facilities, exchanges of property, or any other conveniences or operating arrangements which they may deem necessary or desirable to obtain or to grant or to effect, including arrangements for merger, consolidation, purchase, sale or lease, and any guaranty of securities, and the Reorganization Managers may make contracts therefor binding upon the New Company, and, generally, the Reorganization Managers may make and ratify such purchases. contracts, stipulations or arrangements as will in their opinion operate directly or indirectly to aid in the preservation. improvement, development or protection of any property now constituting the St. Louis and San Francisco Railroad System, or which the Railroad Company or any of its constitutent, controlled, subsidiary or lessor companies has contracted to acquire, or to prevent or avoid opposition to or interference with or otherwise aid, the successful execution of the Plan and this Agreement. The Reorganization Managers may, at public or private sale, or otherwise, and at such price or prices and upon such terms and conditions as in their discretion they may determine, dispose of any securities of the New Company left in their hands because of any failure to make deposits hereunder or for any other reason, or they may use such securities for the purpose of carrying out the reorganization in such manner as they may deem expedient.

[fol. 385] Seventh. The Reorganization Managers shall be the sole and final judges as to whether and when holders of a sufficient amount of the securities of the various classes shall have assented to the Plan and this Agreement to render it advisable to declare the Plan operative, and their determination in that respect shall be final, binding and conclusive upon all Depositors. They may, in their discretion, declare the Plan operative as to all classes of securities for which provision is made in the Plan or only as to certain classes of such securities, provided that the Refunding Mortgage Bonds and the General Lien Bonds which shall have been deposited under or subject to this Plan of Agreement shall be among the securities as to which the Plan is declared operative. In case the Reorganization Managers shall declare the Plan operative as to any classes of deposited securities, they shall thereupon publish notice to that effect in the manner provided in Article Eleventh hereof. In case the Reorganization Managers shall declare the Plan operative but shall exclude therefrom any class of the deposited securities, the securities of the classes so ex-

cluded, or the proceeds thereof or substitutes therefor then under the control of the Reorganization Managers, shall be delivered to the holders of certificates of deposit representing the securities of such class in proportion to their respective interests, upon surrender of their respective certificates in negotiable form and upon payment only of such taxes as may be imposed upon the transfer and delivery of the securities represented by such certificates. The Re. organization Managers shall also have full power and authority, whenever they shall deem proper, to abandon, or to alter, modify or depart from, the Plan or any part thereof. They may, at any time or times, after any such partial abandonment, restore to the Plan and abandoned part or parts thereof, and may seek to carry the same into effect as fully as if such part or parts had not been abandoned. They may also attempt to earry the Plan into effect rather abandon or modify the same, even though it be manifest that, as carried out, the Plan must depart from the original Plan or from some part thereof. But in case of any intentional change or modification of the Plan which in the judgment of the Reorganization Managers shall adversely affect to a material degree the Depositors of any class of securities, a statement of such proposed change or modification shall be filed with the Depositaries of the class of securities. so adversely affected, and notice of the fact of such filing shall be given as provided in Article Eleventh hereof; and holders of certificates of deposit for such particular class or [fol. 386] classes or securities so adversely affected, may, at any time within twenty days after the first publication of such notice, upon surrender of their respective certificates in negotiable form and upon payment of (a) such taxes as may be imposed upon the transfer or delivery of the securities withdrawn, and upon payment also, in the case of holders of certificates of deposit for Refunding Mortgage Bonds or General Lien Bonds (including the French Series) or stock of the Railroad Company, of (b) their pro rata shares, as apportioned by the Reorganization Managers, of the expenses of the Reorganization Managers (including in that term wherever used in the Plan or this Agreement, the compensation of the Reorganization Managers and the compensation and expenses of any committee for, or other representatives of, securities dealt with under the Plan

which shall have been assumed or paid by the Reorganization Managers), and (c), if the Reorganization Managers in their discretion shall so require, such sum as the Reorganization Managers in their sole and unrestricted discretion shall fix as the ratable proportion of all other indebtedness, obligations and liabilities of the Reorganization Managers to be borne by such certificate holders, withdraw from the Plan and this Agreement, and thereupon shall be entitled to receive the deposited securities represented by the certificates so surrendered, or the proceeds thereof or substitutes therefor then under the control of the Reorganization Managers, in proportion to their respective interests, and, if the Reorganization Managers shall have reonired the payment of any sum pursuant to subdivision (c) of this clause certificates of interest representing their pro rata share as fixed by the Reorganization Managers in their sole and unrestricted discretion of any other securities or property acquired by the Reorganization Managers and not previously or simultaneously sold, contracted to be sold or otherwise disposed of by the Reorganization Managers, or, as the Reorganization Managers in their discretion may determine, certificates in such form and with such provisions as the Reorganization Managers shall prescribe evidencing their pro rata interests in such securities or property and in the ultimate proceeds of any liquidation or any other dealing therewith by the Reorganization Managers. Every certificate holder not so surrendering and withdrawing within such twenty days after the first publication of such notice shall be deemed to have assented to the proposed changes or modifications, and, whether or not otherwise objecting, shall be bound thereby as fully and effectively as if he had actually assented thereto. Any [fol. 387] changes or modification finally made by the Reorganization Managers shall be part of the Plan and this Agreement; and all provisions and references herein concerning the Plan shall apply to the Plan so changed or modified. A change or modification of the Plan pursuant to which additional Common Stock or additional Preferred Stock carrying any dividend rate authorized by the Plan may be issued in the reorganization, shall not be deemed to affect adversely the Depositors of any class of securities or stock.

In case the Reorganization Managers shall finally abandon the entire Plan, they shall thereupon publish notice to that effect in the manner provided in Article Eleventh hereof. In case of such abandonment of the entire Plan holders of certificates of deposit shall, upon the surrender of their respective certificates in negotiable form and upon payment of (a) such taxes as may be imposed upon the transfer and delivery of the securities withdrawn, and upon payment also, in the case of holders of certificates of deposit for Refunding Mortgage Bonds or General Lien Bonds (including the French Series) or stock of the Railroad Company, of (b) such sum as the Reorganization Managers in their sole and unrestricted discretion shall fix as the ratable proportion of the expenses and all other indebtedness, obligations and liabilities of the Reorganization Managers to be borne by such certificate holders, be entitled to withdraw and receive the securities represented by the certificates of deposit so surrendered, or the proceeds of, or substitutes for, such securities then under the control of the Reorganization Managers, and in the case of holders of certificates of deposit for Refunding Mortgage Bonds or General Lien Bonds (including the French Series) or stock of the Railroad Company, a proportionate part, as determined by the Reorganization Managers, of any other securities or property acquired by the Reorganization Managers and not previously or simultaneously sold, contracted to be sold, or otherwise disposed of by the Reorganization Managers, or, as the Reorganization Managers in their discretion may determine, certificates in such form and with such provisions as the Reorganization Managers shall prescribe evidencing such proportionate interest in such securities or property and in the ultimate proceeds of any liquidation or other dealing therewith by the Reor-[fol. 388] ganization Managers in pursuance of the provisions of such certificates; provided, however, that in case of such abandonment of the entire Plan, the Refunding Committee (or a majority of the persons now constituting such Committee) and/or the General Lien Representatives and/or the Attorney-in-fact may, at or after commencement of the publication of notice of abandonment, file with each of the Depositaries for the Refunding Mortgage Bonds, or with the Depositary for the General Lien Bonds, or with

the Depositary for the Attorney-in-fact, as the case may be, a plan or an agreement, or both, looking toward concerted action on behalf of the holders of the bonds of the class now represented by them, and upon such filing shall publish notice thereof in the manner prescribed in Article Eleventh hereof, and every holder of a certificate of deposit issued under the Agreement of June 20, 1914, or under the Agreement of May 28, 1913, or by the Depositary for the Attorney-in-fact or any of its agents, as the case may be, not surrendering his certificate of deposit in compliance with the provisions of this Agreement in such respect and withdrawing his securities as hereinbefore provided within a period of thirty days commencing upon the first publication of such notice of filing, shall be irrevocably and conclusively deemed to have assented to the plan or agreement, or both. so filed, and whether or not otherwise objecting shall be bound and concluded thereby as fully and effectually as if he had actually assented thereto and shall be deemed to have become a party thereto with like effect as if he had executed the same under seal, and shall cease to have any further right to withdraw his securities. Upon the expiration of said period of thirty days the Refunding Committee (or a majority of the persons now constituting such committee) or the General Lien Representatives or the Attorney-in-fact, as the case may be, so filing such plan or agreement, or both, shall thenceforth upon payment of the sums payable as hereinbefore provided in respect of withdrawals of the securities represented by certificates of deposit issued under the Agreement of June 20, 1914, or under the Agreement of May 28, 1913, or by the Depositary for the Attorney-in-fact or any of its agents, as the case may be, not so withdrawn within said period of thirty days, shall be vested under the terms of the plan or agreement, or both, so filed, as trustees of an express trust with the legal title of all the securities, certificates of interest or other property distributable in respect of such certificates of deposit upon withdrawal as hereinbefore provided.

[fol. 389] The Reorganization Managers shall have power to determine and to apportion the ratable share of expenses, indebtedness, obligations and liabilities to be borne by each class of deposited securities and the ratable share of other securities and property, or certificates of interest

therein, to be distributed to each class of deposited seen; ties upon any withdrawal under any of the provisions of this Agreement, and the apportionments so made by the Reorganization Managers shall be final, binding and conclusive upon all the Depositors and upon any committees for. or other representatives of, such securities; provided, however, that in case of the modification or abandonment of the Plan such expenses, indebtedness, obligations and liabilities shall be apportioned only among the holders of certificates of deposit representing Refunding Mortgage Londs, General Lien Bonds (including the French Series) and stock of the Railroad Company, and provided further. that in such case the amounts paid by holders of certificates of deposit for stock to entitle them to exercise the right of subscription conferred by the Plan, or any securities or other property acquired therewith, or the proceeds thereof. when received, shall, subject as aforesaid, be distributed or equitably adjusted among the respective holders of such certificates of deposit for stock who shall have complied with all the terms and conditions of this Plan and Agreement, in proportion to the amounts paid in respect thereof. The abandonment of the entire Plan shall not affect any previous acts or obligations done or undertaken by the Reorganization Managers.

Every Depositor who shall exercise any right of withdrawal conferred by any provision of this Agreement shall by the surrender of his certificate of deposit and such withdrawal thereupon, without further act, be relieved from the Plan and this Agreement, and shall cease to have any rights thereunder, and the exercise of such right of withdrawal shall release and discharge the Reorganization Managers, the Depositaries and all other parties from all liability and accountability under this Plan and Agreement; provided, however, that such withdrawal shall not in any wise affect any rights or powers of the Reorganization Managers hereunder, or as may be reserved in any certificate of interest, to deal with any securities or property theretofore or thereafter acquired by the Reorganization Managers, notwithstanding the issuance to such withdrawing Depositors of certificates of interest in respect of such securities or property. Deposited securities cannot without [fol. 390] the consent of the Reorganization Managers be

withdrawn from this Plan and Agreement except as and when in this Agreement provided.

Eighth, Said firms of J. & W. Seligman & Co. and Speyer & Co. shall be the Reorganization Managers noder this Plan and Agreement. Both firms as such Reorganization Managers shall act and concur in all steps and proceedings hereunder, and no action shall be taken except with the assent of both firms. Each of said firms shall act as a copartnership, and in case of any change in either of said firms, the respective firms of J. & W. Seligman & Co. and Spever & Co., or their respective successor firms, as from time to time constituted, shall continue as reorganization Managers, with all the powers, rights and title vested in the Reorganization Managers hereunder. Neither the Reorganization Managers nor any of the Dopositaries assume any personal responsibility for the execution of the Plan or of this Agreement, or any part of either, nor for the result of any steps taken or acts done for the purposes thereof; the Reorganization Managers, however, undertake in good faith to endeavor to execute the same. No Depositary nor either of the firms constituting the Reorganization Managers nor any member of either of said firms shall be personally liable for any act or omission of any agent or employee selected in good faith, nor for any error of judgment or mistake of law, nor in any case except for his, its or their own individual wilful malfeasance or neglect. The Restganization Managers shall be entitled to compensation for their services in that behalf and the amount thereof when determined in accordance with the Plan shall be finally binding and conclusive upon all parties. The Reorganization Managers may form or procure the formation of the Purchase Syndicate and the Loan Syndicate described in the Plan and also any other syndicate or symbicates which they may deem advantageous for carrying out the purposes of the Plan, and may act as Managers of such symbicate or syndicates and may so act in association with others, and such syndicates shall be entitled to such compensations of commissions as are provided by the Plan or as shall be determined by the Reorganization Manager. Any member of either firm constituting the Reorganization Managers. or any of the Depositaries, or any member of the Refunding Committee, or the Attorney-in-fact, at any time, may be a

Voting Trustee, and either of said firms or any member of either thereof or any corporation of which any member of either thereof may be an officer or director, or any Deposi-[fol. 391] tary, or any officer or director of any Depositary, or any member of the Refunding Committee, or the Attorney-in-fact, or any of the Voting Trustees, or any firm in which any of the Voting Trustees or any member of the Refunding Committee or the Attorney-in-fact may be a partner, or any corporation of which any of the Voting Trustees or any member of the Refunding Committee or the Attorney-in-fact may be an officer or director. may be or become pecuniarily interested in any contracts. property or matters which this Agreement concerns, including participation in or under any syndicate agreement, as syndicate managers, syndicate subscribers or otherwise, whether or not mentioned in the Plan, or may be an incorporator, officer or director of the New Company. Any of the Depositaries may be trustee under any mortgage or agreement created or entered into in connection with the Plan or otherwise act in any manner for the New Company or for the holder of any of the new securities. The deposited securities shall be held by the various Depositaries subject in all respects to the control of the Reorganization Managers, and any direction given by the Reorganization Managers shall be full and sufficient authority for any action of any Depositary or of any trust company or of any other custodian or of any committee or

The Reorganization Managers may employ counsel, depositaries, agents and all necessary assistants and may
delegate any power or authority as well as discretion; and
they may incur and discharge any and all expenses which
they deem reasonable for the purposes of the Plan or for
carrying out or attempting to carry out the same, and as
well all expenses in connection with the preparation of the
Plan and this Agreement, the issue of certificates of deposit
and the issue and transfer of securities, legal expenses, expenses for advertising and printing, and all taxes, all expenses of or incident to the receivership proceedings of the
Railroad Company and of any of its subsidiary or controlled companies, all expenses and compensation of depositaries, all organization and other expenses of the New

Company and of any other company or companies utilized in connection with the reorganization, and all other expenses in any manner connected with the Plan and this Agreement of which they may deem it expedient to incure in undertaking to promote any of the purposes thereof. The Reorganization Managers shall be the sole judge of the propriety or expediency of any and all expenses and the amount thereof. The Reorganization Managers may in-[fol. 392] clude as part of their expenses the compensation, expenses and liabilities including counsel fees, of the Refunding Committee acting under the Agreement of June 20, 1914, of the General Lien Representatives acting under the Agreement of May 28, 1913, and of the Attorney-in-fact and the Committee of Defense and the Office National represented by him, all of whose accounts shall be filed with the Reorganization Managers if the Plan shall be declared operative and when approved by them, shall be finally binding and conclusive upon all parties having any interest therein; and for all their expenses, indebtedness, obligations and liabilities, the Reorganization Managers shall have a lien upon all the deposited securities and upon all property and securities acquired in the course of the reorganization, and, until their delivery or distribution, upon the new securities contemplated by the Plan.

All moneys paid under or with reference to the Plan and this Agreement shall be paid over to the Reorganization Managers, who shall as bankers hold the same (or who may deposit the same in whole or in part with any bank, bankers or trust company), subject to application for any of the purposes of this Plan and Agreement as may be most convenient, and as from time to time may be determined by the Reorganization Managers, whose determination as to the propriety and purpose of any such application shall be final, and nothing in the Plan shall be understood as limiting or requiring the application of specific moneys to spe-

cific purposes,

Ninth. The enumeration of specific powers hereby conferred shall not be construed to limit or to restrict general powers herein conferred or intended so to be; and it is hereby declared that it is intended to confer on the Reorganization Managers, in respect of all deposited securities, and in all other respects, any and all powers which the Re-

organization Managers may deem expedient in or towards carrying out or promoting the purposes of this Plan and Agreement in any respect even though any such power be apparently of a character not now contemplated; and the Reorganization Managers may exercise any and every such power as fully and effectively as if the same were herein distinctly specified, and as often as, for any reason, they may deem expedient. The Reorganization Managers may, before declaring the Plan operative, exercise any or all the powers conferred upon them by this Agreement, in whole or in part. The methods to be adopted towards carrying out this Agreement shall be entirely discretionary with the Reorganization Managers; and the Plan and this Agreement [fol. 393] are in all respects to be liberally construed so as to enable the reorganization Managers to carry into effect the purposes of the Plan, whether in the form hereto annexed or with such modifications or substitutions as may be made pursuant to any of the provisions of this Agreement. Anything which anywhere in the Plan or this Agreement the Reorganization Managers are authorized to do or allow to be done, they may do or allow to be done by or through such agents or agencies as in their discretion they may determine, or by or through others, with their approval, consent. or acquiesence, or by contracting therefore with any person, firm or corporation. The Reorganization Managers may construe the Plan and this Agreement, and their construction thereof or action thereunder in good faith shall be final and conclusive. They may supply any defect or omission, or reconcile any inconsistency, in such manner and to such extent as shall be expedient to carry out the same effectively and they shall be the sole and final judges of such expediency. Any action contemplated in this Plan and Agreement to be performed on or after completion of the reorganization, may be taken by the Reorganization Managers at any time when they shall deem the reorganization advanced sufficiently to justify such course, and the Reorganization Managers may defer, as they may deem expedient, the performance of any provision of this Plan and Agreement, or may commit such performance to the New Company and may cause the New Company to pay or assume any indebtedness or liabilities authorized or incurred by the Reorganization Managers or otherwise in furtherance of the Plan, or to make or assume any obligations which in the judgment of the Reorganization Managers may be expedient to carry out the Plan and this Agreement.

Tenth. All securities and other obligations deposited under this Plan and Agreement, or acquired by the Reorganization Managers under any of the provisions hereof, shall remain in full force and effect for all purposes, and shall not be deemed to have been merged, satisfied, released or discharged by any delivery of new securities, and no right or lien shall be deemed released or waived, but said securities and obligations, and any judgment upon any of such securities or obligations, including claims and judgments for deficiencies, and all liens and equities, shall remain unimpaired, and may be enforced by the Reorganization Managers or by the New Company, or by any other assignce of the Reorganization Managers until paid or satisfied in full or expressly released. Neither the Reorganization Managers nor any security holders or other creditors of the Railroad Company, by executing this Agreement, or by [fol. 394] becoming parties hereto, release, surrender, or waive any lien, right or claim whatsoever, and all such liens, rights, or claims shall vest unimpaired in the Reorganization Managers and their assigns or successors in interest; and any purchase or purchases by or on behalf of the Reorganization Managers, or their nominees, under any decree for the enforcement of any such lien, right or claim, shall vest the property purchased in the Reorganization Managers or their nominees, free from all interest or claim on the part of any stockholders or creditors of the Railroad Company, or any other parties. No right is conferred, nor is any trust, liability or obligation (except the agreements herein contained in favor of the Depositors) created by this Plan and Agreement or assumed hereunder, or by or for the New Company in favor of any security holder, or any other creditor, or of any holder of any claim whatsoever against the Railroad Company, nor in favor of any company now existing or to be formed hereafter (whether such claim be based on any bonds, coupons, stocks or other securities, lease, guaranty or otherwise), with respect to any securities deposited under this Agreement or any moneys paid to or received by the Reorganization Managers or the Depositaries hereunder, or with respect to any property acquired by purchase at any foreclosure sale, or with respect to any new securities to be issued, or with respect to any other matter or thing.

Eleventh. All calls or notices bereunder, except when herein otherwise expressly provided, shall be inserted in The Sun and the New York Times, two daily papers of general circulation in the City of New York, twice in each week for two successive calendar weeks, beginning on any In case either of said newspapers shall day of the week. not at the time be published the Reorganization Managers may select such other newspaper or newspapers of general circulation as they shall see fit in the place of the newspaper the publication of which shall have ceased. Any call or notice whatsoever when so published by the Reorganization Managers shall be taken and considered as though personally served on all parties hereto and upon all parties bound hereby, as of the date of the first insertion thereof, and such publication shall be the only notice required to be given under any provision of this Plan and Agreement.

Twelfth. The accounts of the Reorganization Managers shall be filed with the Board of Directors the New Company within one year after its organization shall have been completed, unless a longer time be granted by said Board. The [fol. 395] accounts, when approved by such Board of Directors and until disapproved by said Board, shall be final, binding and conclusive upon all parties having any interest therein, and thereupon the Reorganization Managers shall be discharged. The acceptance of new securities by any Depositor shall estop such Depositor from questioning the conformity of such securities in any particular to any provisions of the Plan; and the acceptance of new securities by the holders of a majority in amount of the certificates of deposit for any class of securities shall in each case respectively so estop all holders of certificates of deposit for securities of that class, and shall constitute a release and discharge of the Reorganization Managers, the committee or other representative issuing the certificates of deposit in respect of the securities of such class and the Depositaries on the part of all the holders of all outstanding certificates for securities of such class, from all liability and accountability of any kind, character and description whatsoever, save the obligation to make delivery of a like prorata amount of cash, securities or other property or certificates of interest therein upon the surrender of outstanding certificates of deposit for securities of such class.

Thirteenth. The Plan and this Agreement shall bind and benefit the several parties, including the Depositors hereunder, their and each of their survivors, heirs, executors, administrators, successors and assigns. This Agreement may be executed in any number of counterparts, all of which shall constitute one and the same instrument.

In witness whereof the Reorganization Managers have subscribed this Agreement, or a counterpart thereof, as to the date hereof and the Depositors have become parties hereto in the manner hereinbefore provided.

> J. & W. Seligman & Co., Speyer & Co., Reorganization Managers.

Before the Public Service Commission of the State of Missouri

## No. 815

In the Matter of the Application for Authorization of the Reorganization of St. Louis and San Francisco Railroad Company and for an Order Authorizing the Issue of Stocks and Bonds.

[fol. 396] The petition of J. & W. Seligman & Co., and Speyer & Co., as Reorganization Managers under a Plan and Agreement of Reorganization, dated November 1, 1915, and now applying for the authorization by the Public Service Commission of the State of Missouri of said Plan of Reorganization, which is hereto annexed and marked Exhibit A, respectfully shows:

1. The petitioner, J. & W. Seligman & Co., is a co-partnership engaged in the business of banking, whose principal place of business and post office address is 1 South William

Street, Borough of Manhattan, City and State of New York. The petitioner, Speyer & Co., is a co-partnership engaged in the business of banking, whose principal place of business and post-office address is 26 Pine Street, Borough of Manhattan, City and State of New York. The petitioners have jointly been constituted Reorganization Managers under said Plan of Reorganization.

II. St. Louis and San Francisco Railroad Company (hereinafter called the Railroad Company) was organized June 29, 1896, under the laws of Missouri, in connection with the reorganization of St. Louis and San Francisco Railway Company.

III. The lines of railroad of the Railroad Company and of its leased and auxiliary companies, all of the capital stock of which it owns, which are to be embraced in the reorganized System contemplated by the Plan, including the line of railroad of Quannah, Acme and Pacific Railway Company, extend in general from St. Louis and Kansas City, Missouri, to Ellsworth, Kansas, Waynoka, Oklahoma, Oklahoma City, Oklahoma, Quanah and Vernon, Texas, Dallas, Fort Worth and Menard, Texas, and Memphis, Tennessee, and Birmingham, Alabama, and comprise about 5,154.71 miles of first main track in the following states:

Alabama	132.49 Miles
Arkansas	597.50 "
Kansas	629.97 "
Missouri	1713.79 "
Mississippi	149.86 "
Oklahoma	1497.56 "
Tennessee.	18.34 "
Texas	422.27 "

[fol. 397] The Railroad Company also operates 203.46 miles of main line trackage rights in the following states:

Missouri												6	18	Miles.
Oktanoma												23	26	4.4
Texas												174	02	66

IV. The properties and franchises of the Railroad Company have been in the hands of Receivers appointed by the United States District Court of the Eastern Division of the

Eastern District of Missouri since May 27, 1913. On May 1 1914, default was made in the payment of the interest then falling due on the \$69,284,000 of the Railroad Comnany's General Lien 15-20 Year Five Per Cent Gold Bonds. and on July 1, 1914, default was made in the payment of the interest which fell due on that date on the \$68,557,000 of Refunding Mortgage Gold Bonds. No interest has been naid on either issue since those defaults and proceedings have been instituted for the foreclosure of the mortgages securing the two issues. Defaults have also been made in the payment of the principal and interest of the Railroad Company's \$2,250,000 Two Year Five Per Cent Secured Gold Notes and \$2,600,000 Two Year Six Per Cent Secured Gold Notes and in the payment of interest on the Railroad Company's \$28,582,000 of New Orleans, Texas and Mexico Division First Mortgage Bonds, \$12,153,750 of Trust Certificates for Preferred Stock of Chicago and Eastern Illinois Railroad Company and \$16,944,500 of Trust Certificates for Common Stock of Chicago and Eastern Illinois Railroad Company, and on the guaranty of the Railroad Company of the interest payable on \$14,000,000 of New Orleans Terminal Company First Mortgage Four Per The difficulties of the Railroad Cent Gold Bonds. Company were in large measure due to the failure of the Chicago and Eastern Illinois and New Orleans, Texas and Mexico Systems to earn the fixed charges which the Railroad Company had assumed in connection with its acquisition of interests therein, and it is not intended that the lines of those systems or the property of the New Orleans Terminal Company (which is operated in connection with the New Orleans, Texas and Mexico System), shall be included in the reorganization.

V. Immediately following the receivership in 1913, a committee was organized to represent holders of Refunding Mortgage Bonds and the deposit of said bonds was subsequently called for under the terms of an Agreement dated June 20, 1914. Speyer & Co. immediately following said receivership called for the deposit of the General Lien [fol. 398] 15-20 Year Gold Bonds under a Bondholders' Agreement dated May 28, 1913. A Committee of Defense has also been formed by Office National des Valeurs Mo-

bilieres, Paris, to represent French holders of General Lien 15-20 Year Gold Bonds, French Series, and a large num. ber of said holders have designated L. C. Krauthoff, Esq., as their attorney in fact. These representatives of bond. holders have for a long time been engaged in an examination of the affairs of the Railroad Company's System, and the relative value and earning capacity of its various lines. with a view to formulating a Plan of Reorganization which would fairly recognize the rights of the security-holders. Much time and attention have been devoted to acquiring knowledge as to details, and a careful expert examination of the Railroad Company's operations and physical condition and of its financial requirements has been made by Mr. J. W. Kendrick. The plan for the reorganization which is submitted herewith has been formulated as a result of such examination, and it is expected will accomplish, among other things, the following results:

- Reduction of the fixed charges to a limit believed to be safely within the net earning capacity of the reorganized property;
- 2. Adequate capital provision for present and future requirements;
- 3. Payment or adjustment of all debts, guaranties, etc., and provision for existing equipment trust obligations;

4. The preservation of the parts of the System deemed advantageous, and such control for the reorganized property as shall safeguard the rights of security holders.

Said Plan has been prepared and adopted by said Committee representing Refunding Mortgage Bonds, by Speyer & Co., representing General Lien Bonds deposited under the Agreement of May 28, 1913, and by L. C. Krauthoff representing the Committee of Defense and as attorney-in fact for French holders of General Lien Bonds.

Committees representing the holders of the following securities have approved the provisions of the Plan with reference to the treatment of such securities: New Orleans, Texas and Mexico Division First Mortgage Gold Bonds, Two Year Five Per Cent Secured Gold Notes, Two Year Six Per Cent Secured Gold Notes, St. Louis & San Francisco Railroad Company Trust Certificates for Preferred and Common stock of Chicago & Eastern Illinois Railroad [fol. 399] Company, and Ozark & Cherokee Central Railroad Company First Mortgage Five Per Cent Gold Bonds. Said Plan has also been approved by the Committee representing stockholders of the Railroad Company under an

Agreement dated December 1, 1913.

VI. The lines of railroad and equipment intended to be embraced in the reorganization have been appraised by persons familiar with the property, on the basis of reproduction cost, at \$319,276,000. It is contemplated that the New Company provided for in the Plan will acquire miscellaneous securities and real estate not included in the above-mentioned properties which have been appraised at approximately \$2,500,000 and it is estimated that the cash which the New Company will receive from the Receivers together with the new cash provided by the Plan for capital purposes will exceed in the aggregate \$10,000,000. The entire capitalization of the New Company's System upon the consummation of the Plan (including the Kansas, Fort Scott & Memphis System) will be well within the appraised value of the property and the cash thus provided.

VII. Of the 5358.17 miles of railroad constituting the Railroad Company's System and included in the reorganized Systems as stated in Paragraph III, the lines of railroad owned directly by the Railroad Company comprise 3522.59 miles of first main track in the following states:

Arkansas	348.93	Miles.
Kansas		4.4
Missouri	1,330.38	4.4
Oklahoma		

VIII. The Railroad Company owns the entire capital stock of Kansas City, Fort Scott & Memphis Railway Company and operates the lines of railroad of that Company under a lease for ninety-nine years from August 23, 1901. Those lines constitute 919.45 miles of first main track, running in general from Kansas City to Memphis in the following states:

Arkansas															248	.57	Miles.
Kansas															259	.43	4.4
Missouri															383	.34	4.4
Oklahoma																	
Tennessee																	

[fol. 400] The Railroad Company operates under a lease running for ninety nine years from December 17, 1903, the lines of railroad of Kansas City, Memphis & Birmingham Railroad Company, the entire capital stock of which is owned by Kansas City, Fort Scott & Memphis Railway Company. These line constitute 290.4 miles of first main track running in general from Memphis, Tennessee, to Birmingham and Bessemer, Alabama, in the following states:

Alabama	 132	49	Miles.
Mississippi	142	86	4.4
Tennessee	15		6.6

The Railroad Company owns the entire capital stock of Birmingham Belt Railroad Company, which Birmingham Belt Railroad Company, which operates a belt and terminal system in the City of Birmingham, consisting of about fourteen acres of well located real estate, and 39.01 miles of track, serving thirty-four industries.

The Railroad Company owns the entire capital stock of Kansas City and Memphis Railway & Bridge Company which owns the bridge over the Mississippi River near

Memphis.

The properties described in this paragraph VIII are hereinafter collectively called the K. C. Ft. S. M. System.

IX. The Railroad Company owns the entire capital stock of the following companies which operate lines of railroad in Texas:

Fort Worth and Rio Grande Railway Com-			
pany	223	44	Miles.
Brownwood North & South Railway Com-			
pany	17	65	4.6
St. Louis, San Francisco & Texas Railway			
Company	85		4.4
Paris & Great Northern Railway Company	16.	94	6.6

X. The Railroad Company owns or has interests in valuable terminals and terminal facilities at St. Louis, Kansas City, Wichita, Memphis, Birmingham, Dallas and other points on the lines of the system.

XI. The Plan of Reorganization which is submitted herewith contemplates that all the lines of railroad and inter-

ests hereinbefore in paragraphs VII to X, inclusive, described shall be included in the reorganized System either by direct ownership or by ownership through securities or by the continuance of existing leases and their transfer to the New Company contemplated by the Plan, the bonds of [fol. 401] the K. C., Ft. S & M System, however, to remain undisturbed.

XII. The Railroad Company also owns \$6,777,800 of common stock and \$8,102,500 of preferred stock of Chicago & Eastern Illinois Railroad Company, for which the Railroad Company issued its stock trust certificates to the amount of \$12,153,750 for preferred stock and \$16,944,500 for common stock, these certificates bearing guaranteed dividends at the

rate of four per cent per annum.

The Railroad Company also owns the entire capital stock of New Orleans, Texas & Mexico Railroad Company and has issued \$28,128,000 of its New Orleans, Texas & Mexico Division First Mortgage Gold Bonds, secured by a first mortgage on the property of the latter Company. In July, 1913, the New Orleans, Texas & Mexico lines were placed in the hands of separate receivers. They have been operated independently of the Railroad Company's system since then, and are now in process of separate reorganization.

As hereinbefore stated it is not intended that the lines of Chicago & Eastern Illinois Railroad Company or those of New Orleans, Texas & Mexico Railroad Company, or the property of New Orleans Terminal Company (which is operated in connection with the New Orleans, Texas & Mexico System), shall be taken over in any manner by the

New Company on the reorganization.

XIII. The capitalization and fixed charges of the Railroad Company as of June 30, 1915, (including equipment trust obligations and receivers' certificates and including the bonded debt of Quanah, Acme and Pacific Railway Company but excluding its outstanding \$100,000 of capital stock), were as follows:

#### Annual Interest Charge or Guaranty

\$3,000,000	Receivers' Certificates	\$180,000
9,484,000	St. Louis & San Francisco Rail- way Company General Mort-	
	gage 5% and 6% Bonds ma-	***
	turing 1931	511.010

9,932,636 68,557,000	Equipment Trust Certificates Refunding Mortgage 4% Gold	1503,5000
69,284,000	Bonds	2.12.20
1,558,000	Gold Bonds in hands of Public Consolidated Mortgage 4% Gold	3,461,200
829,000	Bonds Southwestern Division 1st Mort-	62,725
145,000	gage 5% Gold Bonds	11,150
[fol. 402] 47,000	4% Gold Bonds Northwestern Division 1st Mort-	.5, MIN
2,250,000	gage 4% Gold Bonds Two-Year Five Per Cent Secured	1,550
2,600,000	Gold Notes Two-Year Six Per Cent Secured	112.500
439,000	St. Louis & San Francisco Rail-	Latern
	way Company Trust Mortgages 5% Gold Bonds of 1887.	21,950
182,000	St. Louis & San Francisco Rail- way Company Trust Mortgage	
79,000	6% Gold Bonds of 1880 Missouri & Western Division 1st	10,5020
304,000	Mortgage 6% Gold Bonds	4.740
	St. Louis, Wichita & Western Railway Company 1st Mort- gage 6% Gold Bombs	18200
13,510,000	Kansas City, Fort Scott & Mem- phis Railroad Company Pre- ferred Stock 4% Trust Certifi-	
100,000	cates in lands of public Muskogee City Bridge Company	See tens
225,000	1st Mortgage 5% Gold Rands, St. Louis, Memphis & Southeast- ern Railroad Company 1st	7.10 41
	Mortgage 4% Gold Bonds tu hands of public	\$8,696.963
140,000	Chester, Perryville & Ste. Gene- vieve Railway Company 1st Mortgage 5% Gold Bends	7.(88)
54,000	Pemiscot Railroad Company 1st Mortgage 6% Gold Bonds	3.240
65,000	Kennett & Osceola Railroad Com- pany 1st Mortgage 6% Gold	3,24
4,500	Bonds Southern Missouri & Arkansas Railroad Company 1st Mort-	22,5683
2,020,000	Fort Worth & Rio Grande Rail- way Company 1st Mortgage 4%	225
2,550,000	Gold Bonds	116.1630
1,758,000	3% Gold Bonds. Quanah, Acme & Pacific Railway Company 1st Mortgage 6%	\$ 8 8 KM MI
23,128,000	Gold Bonds.  New Orleans, Texas & Mexico Division 1st Mortgage 5/2 Gold	1150,000
Sternion)	New Orienns, Texas & Mexico Division 1st Mortgage 45%	1,156,100
	Gold Bonds (French Series)	225,000

* (881(88)	New Orleans, Terrorical Company Let Mortgage 4's field Femile	Trees (MARK)	
B2 852 85m	throng said of bear throngs A Ensiern Ethions Pro-	Sant From	
11.111.300	forged New & Trust Contributions Chicagos & Eastern Illinois Com-		
	men Stark Treet Certificative in bands of public	16.5.5 400	
	Funds (Vent 1953)	329,199,36	
Lift of the loss			812(88)280 (0)
See and	No. Leads and Son Programs Ed- pairs First Professed Stock 40 25, 50 Stock to Tropicity 5	nismi Com minios Sc	
le maineau	St. Louis and San Pronters Est pasty Serond Professori Stark, of stock to Treasury.)	Brogal Cinta includes Citi	
251 0887 66 67	St. Louis and San Francisco Bir part Common Stock combat- stock in Tremony.	Bound Com-	
KINCH PARTY DANS	Total		
	K. C. Pt. S. & M. Systems (To be in Brongerdantism.	600103 (00-60-15-15)	
\$ HOOM HORT	Paradagham Britt Balloud Co.	(01)(1010)	
52 42 man	Ramone City, Pt. Strong & Mono- phile Resilvency Consensor Bu- funding Montgage 8th Could Dunde	N (8615), 65400	
13,236/881	Remers City, \$2, Store & Mon- phie Radiousi Company Com- adistand Montgage 65 Binnis	K219 (HIB)	
(Interested	Conses & Missouri Bullionii Company, First Montgood &'s		
1 (016) (410)		1515 (\$400)	
3 (1990) (1990)	Montgape in Dismits  Kanens City & Mongdon Rails	96 (60)	
	Martings by their Pennis	1 100/1980	
3,325,380		RELIGIES, 080	
7352540		536,000,00	
	Founds  Kontacks and Stations Fund motor  Kontacks (Mr., Ft. Scott & More plate Larges and Miscollamone	386,860	
	cycle PHS:	580000133	
Charles His			3:495 83N.10
	Times Plant Charges		6H8 888 (HS 10

XIV. It appears from the petition of the Railroad Company filed with this Commission on or about May 25, 1905, in connection with an application for authority to issue and sell \$761,000, New Orleans, Texas and Mexico Division First Mortgage Gold Bonds, that none of the outstanding [fol. 404] stock or stock certificates or bonds, notes or other evidences of indebtedness of the Railroad Company have been issued or used in capitalizing the right to be a corporation or any franchise or permit or the right to own, operate or enjoy any such franchise or permit, or any contract, consolidation or lease.

XV. It is contemplated that the various properties will be sold under forcelosure of the Refunding Mortgage or the General Lien Mortgage, or both mortgages, or under the general creditors bill, or otherwise dealt with, and a succeasor company or companies will be organized. Of the securities and stock mentioned in Paragraph XIII, it is planned to leave undisturbed, securities of the Railroad Company to the amount of but \$14,790,000 (\$9,484,000 St. Louis and San Francisco Rail vay Company General Mortgage 5% and 6% Bonds majuring 1931, and \$5,306,000 Equipment Obligations maturing after July 1, 1917) to gether with all bonds of the K. C., Pt. S. & M. System, and it is contemplated that as a consideration for the property. securities and cash to be conveyed and delivered to the New Company, or which it will acquire pursuant to the Plan, it will deliver its bonds and stock. To that end new securities will be created and issued or reserved by the New Company as follows:

# Prior Lien Mortgage Gold Bonds

The Prior Lien Mortgage Bonds will be limited to the total authorized amount of \$250,000,000 at any one time outstanding. They will bear interest payable semi-annually, at such rate not exceeding six per cent per annum, as may from time to time be determined by the board of directors at the time of issue and stated in the bonds, and are to be secured by mortgage and deed of trust to Central Trust Company of New York and some individual Trustees, which it is intended shall embrace all or substantially all the lines of railroad, franchises and equipment, terminals and other property (including stocks and bonds), except as otherwise dealt with under the Plan, acquired by the New Company parsmant to the Plan and also all additional property of

every character (including stocks and bonds) at any time

thereafter acquired by the New Company.

As more fully set forth in the Plan, the Prior Lieu Mortgage Bonds are to be issued, or are to be reserved for issue under the Prior Lieu Mortgage for the following purposes:

Page Local Control	
[fol. 405] In partial exchange for existing securities embraced in the Plan (Series A, Four Per Cent maturing July 1, 1950, redeemable at par and accrued interest)	\$93,398,500
the Plan (Series B, Five Per Cent, maturing	
July 1, 1950, redeemable at 105 and accrued interest)	\$25,000,000
For the corporate purposes of the New Company (Series B, Five Per cent, maturing July 1, 1950, redeemable at 105 and accrued	120100100
interest)	6,811,500
Reserved to retire \$5,306,000 Equipment Trust Certificates maturing after July 1, 1917	5,306,000
Reserved to retire \$9,484,000 St. Louis and San Francisco Railway Company General Mort- gage 5% and 6% Bonds due 1931, undis-	744004
Inrhed	9,484,000
Reserved for issue for new equipment, im- provements, and betterments, and to meet the cost of construction of new mileage or of the acquisition of other lines of railroad	
or stocks or bonds representative thereof	110,000,000
	4950 000 000

The Prior Lien Mortgage Bonds, Series A, provided to be presently issued under the Plan in partial exchange for existing securities, so far as not used in such exchange are to be reserved for such purpose under restrictions to be fixed by the Reorganization Managers, but if in the judgment of the Reorganization Managers if will facilitate the earrying out of the Plan to provide cash for the purposes for which such bonds might otherwise be reserved, they may sell such bonds in whole or in part and may cause the bonds so to be sold to be issued as Series B Bonds, Five Per Cent.

# Cumulative Adjustment Mortgage Gold Bonds

The adjustment Mortgage Bonds will be limited to the total authorized amount of \$75,000,000 at any one time out. They are to be secured by mortgage and deed of trust to Bankers Trust Company and some individual as Trustees on the properties embraced in the Prior Lieu [fol. 406] Mortgage and from time to time becoming subject thereto. The Adjustment Mortgage will be subject to the Prior Lien Mortgage and to the prior payment out of the mortgaged property of all bonds at any time issued and outstanding under the Prior Lien Mortgage. The Adjustment Mortgage Bonds are to bear interest, payable annually or semi-annually as may be provided in the Adjustment Mortgage, at such rate not exceeding six per cent. per annum as may from time to time be determined by the board of directors at the time of issue and stated in the bonds but payable, prior to the maturity of the principal. only out of the Available Net Income of the New Company as shall be defined in the Adjustment Mortgage. The New Company, however will not be required in any year to pay interest except in amounts of one-quarter of one per cent or some multiple thereof, but any fractional amount not so distributed shall be carried forward into the next interest period. The interest on the Adjustment Mortgage Bonds will be cumulative but accumulations of interest shall not bear interest. At the maturity of the principal, all arrears of interest shall be payable.

As more fully set forth in the Plan, the Adjustment Mortgage Bonds are to be issued, or are to be reserved for issue under the Adjustment Mortgage for the following purposes:

In partial exchange for existing securities embraced in the Plan (Series Λ, Six Per Cent, carrying interest from July 1, 1915, matur-	
ing July 1, 1955 and redeemable at par and accrued interest)	\$40,547,818
Reserved for issue for equipment, improvements and betterments, and new mileage constructed or acquired	34,452,182

\$75,000,000

### Income Mortgage Gold Bonds

The Income Mortgage Bonds will be limited to the total authorized amount of \$75,000,000 at any one time outstanding. They are to be secured by mortgage and deed of trust to Union Trust Company of New York and some individual as Trustees, on the properties embraced in the Prior Lien Mortgage, and from time to time becoming subject thereto. The Income Mortgage will be subject to the Prior Lien Mortgage and to the Adjustment Mortgage and to the prior [fol. 407] payment out of the mortgaged property of all bonds at any time issued and outstanding under the Prior Lien Mortgage, and all bonds at any time issued and outstanding under the Adjustment Mortgage. The Income Mortgage Bonds are to bear interest, payable annually or semi-annually, as may be provided in the Income Mortgage, at such rate not exceeding six per cent per annum as may from time to time be determined by the board of directors at the time of issue and stated in the bonds but payable only out of the Available Net Income of the New Company as shall be defined in Income Mortgage, but only after the payment therefrom of all interest on the Adjustment Mortgage Bonds. The New Company, however, will not be required to pay interest except in amounts of onequarter of one per cent or some multiple thereof, but any fractional amount not so distributed will be carried forward into the next interest period. The interest on the Income Mortgage Bonds will not be cumulative. The Income Mortgage Bonds may be made convertible at the option of the holders into Preferred Stock (or, if converted during the life of the Voting Trust, into trust certificates therefor) at par, under conditions and restrictions to be set out in the Income Mortgage. The Income Mortgage Bonds to be presently issued under the Plan will be so convertible into Six Per Cent Preferred Stock (or voting trust certificates therefor).

As more fully set forth in the Plan, the Income Mortgage Bonds are to be issued, or are to be reserved for issue under the Income Mortgage, for the following purposes:

To be issued in partial exchange for existing securities embraced in the Plan and for adjustment of Outstanding Indebtedness; bonds not used or required to be reserved for that purpose to be available for corporate purposes of the New Company (Series A, Five Per Cent Convertible, ranking for interest from July 1, 1915, maturing July 1, 1960, redeemable at par, and interest for proportionate part of current interest period)

\$38,661,200

Reserved for issue for improvements, betterments and additions and equipment....

36,338,800

\$75,000,000

### Preferred Stock

[fol. 408] The Preferred Stock will be entitled to receive for any fiscal year dividends at such rate not exceeding Seven Per Cent per annum and no more as may be from time to time determined by the board of directors at the time of issue thereof and stated in the certificates therefor but such dividends will not be Cumulative. No dividend shall be declared or paid on the Common Stock for any fiscal year until full dividends have been paid or set aside on the Preferred Stock for such fiscal year and no dividend shall be paid on the Preferred Stock for any fiscal year other than out of the net income for such fiscal year anplicable to the payment of dividends, unless for the two fiscal years next preceding, the full interest shall have been paid on the outstanding Income Mortgage Bonds. The Preferred Stock may be issued in series and any series may be made in whole or in part redeemable at the election of the Company on such terms, on such notice and at such premiums as the board of directions may determine at the time of issue and be stated in the certificates of such series.

The Preferred Stock will be issued and reserved as follows:

For adjustment of Outstanding Indebtedness (to be issued as Six Per Cent Stock, and to be redeemable, if allowed by law, at par and proportionate dividend for current dividend period), any stock not so used to be available for the corporate purposes of the New Company  Reserved for conversion of convertible income mortgage bonds:	\$7,000,000
For conversion of \$38,661,200 Income Mortgage Bonds, Series A, Five Per Cent maturing July 1, 1960, presently to be issued under the Plan (to be issued as Six Per Cent Stock and to be redeemable if allowed by law, at par and proportion-	
ate dividend for current dividend period (1)	
	75,000,000
Reserved for future issue for corporate purposes not exceeding	118,000,000 \$200,000,000
The Common Stock will be applied as follo	ws:
Sold to Purchase Syndicate and by it to be offered for subscription to stockholders of the Railroad Company on the terms and conditions stated in the Plan For adjustment of Outstanding Indebtedness,	\$47,700,000
any stock not so used to be available for the corporate purposes of the New Company	5,300,000
Reserved for future issue for corporate purposes not exceeding	197,000,000
	\$250,000,000

Particular Provisions, Restrictions and Limitations

Provision will be made in the Prior Lien Mortgage and also in the Adjustment Mortgage and in the Income Mort. gage for an annual auditing, on behalf of the holders of bonds issued under the mortgages, of the accounts of the New Company by certified public accountants, for inspection by experts of the New Company's lines of railroad and equipment from time to time as the Corporate Trustees under the mortgages may require, and for the statement in detail by the New Company in every annual report of all the stocks, bonds and other securities of the New Company or of any subsidiary company of its System pledged or sold by the New Company or its respective subsidiary companies during such year and the amounts in each case realized from every such pledge or sale. For a more detailed statement of such provisions reference is hereby made to the Plan.

Provision is to be made that the New Company shall not create any additional mortgage, nor increase the amount of Preferred Stock authorized under the Plan, except in each instance after obtaining the consent of the holders of a ma-[fol. 410] jority of the whole amount of Preferred Stock outstanding, given at a meeting of the stockholders called for that purpose, and the consent of the holders of a majority of such part of the Common Stock as shall be represented at such meeting, the holders of each class of stock voting separately. During the existence of the Voting Trust, similar consent of holders of like amounts of the respective classes of certificates of beneficial interest shall also be necessary for the purposes indicated.

Provision is also to be made that neither the New Company nor any company controlled by it, shall purchase any line of railroad or take a lease of any line of railroad (other in either case than industrial tracks) or guarantee any part of the principal of, or interest on, any obligation of or any dividend or other payment on the stock of, any other company or acquire more than twenty-five per cent in amount of the stock of any other company unless in each instance after obtaining the assent of the holders of a majority in amount of the outstanding stock, present at a meeting of which not less than twenty days' notice specifying such

business to be acted on thereat, shall have been given in the same manner as may be provided in the by-laws for the Annual Meeting.

The Preferred and Common Stock of the New Company (except such number of shares as may be disposed of to qualify directors) is to be vested in Voting Trustees (under a Trust Agreement prescribing their powers and duties and the method of filling vacancies), for five years, although the Voting Trustees may in their discretion, deliver the stock at an earlier date.

XVI. The new securities presently to be issued under the Plan are proposed to be distributed substantially as follows:

Prior Lien Mortgage Gold Bonds

Series A Bonds delivered in partial exchange for St. Louis and San Francisco Railroad Company Refunding Mortgage Four Per Cent Gold Bonds General Lien 15:20 Year Five Per Cent Gold Bonds will carry interest from July 1, 1915.

Series A Bonds delivered in exchange or partial exchange for other securities will carry interest from Jany, 1, 1916.

Series B Bonds will carry interest from July 1, 1915.

A. Series A. Four Per Cent due 1950, redeemable at par and accrued interest.

American

To be used in partial exchange for

[fol. 411]	1	of prior lien mortgage oonds, series
		1.4%, issued
St. Louis and San Francisco Railroad Company:	Amount outstanding	in partial exchange
Refunding Mortgage Four Per Cent Gold Bonds	868,557,000	\$51,417,750
General Lien 15-20 Year Five Per Cent Gold Bonds	69,384,000	17.346,000
Consolidated Mortgage Four Per Cent Gold Bonds	1,558,000	1,558,000
Southwestern Division First Mort- gage Five Per Cent Gold Bonds	829,000	1,036,250
Central Division First Mortgage Four Per Cent Gold Bonds	145,000	181,250
Northwestern Division First Mort- gage Four Per Cent Gold Bonds	47,000	58,750

	Amount outstanding		
St. Louis and San Francisco Railway Company:			
Trust Mortgage Five Per Cent Gold Bonds of 1887 Trust Mortgage Six Per Cent Gold	439,000	548,750	
Bonds of 1880 Missouri and Western Division First	182,000	227,500	
Mortgage Six Per Cent Gold Bonds. St. Louis, Wichita and Western Rail- way Company: First Mortgage Six	74,000	92,500	
Per Cent Gold Bonds. St. Louis and San Francisco Rail- road Company: Kansas City, Fort Scott and Memphis Railway Com-	304,000	380,000	
pany Guaranteed Four Per Cent Preferred Stock Trust Certificates. Muskogee City Bridge Company:	15,000,000	11.250,000	
First Mortgage Five Per Cent Gold Bonds	100,000	125,000	
Railroad Company: First Mortgage Four Per Cent Gold Bonds	225,000	281,250	
Mortgage Five Per Cent Gold Bonds [fol. 412] Fort Worth and Rio Grande Railway Company: First Mortgage	140,000	175,000	
Four Per Cent Gold Bonds Ozark & Cherokee Central Railway Company: First Mortgage Five Per	2,923,000	2,923,000	
Cent Gold BondsQuanah, Acme and Pacific Railway Company: First Mortgage Six Per	2,880,000	3,600,000	
Cent Gold Bonds	1,758,000	2,197,500	\$93,398,500
B. Series B. Five Per Cent due 195 terest.	0, redeemable	at 105 and	accrued in-
Sold to Purchase Syndicate and by it to be offered for substription to stockholders of the Railroad Company on the terms and condi- tions stated in the Plan		25,000,000	
For the corporate purposes of the			
New Company	********	6.811,500	\$31,811,500
			125,210,000

Amount of

53,000,000

Cumulative Adjustment Mortgage Gold Bonds (Carrying Interest from July 1, 1915)

Series A. Six Per Cent. due 1975, redeemable at par and accrued interest. To be used in partial exchange for

Amount of 6% cumulative adjustment mortgage bonds issued in partial St. Louis and San Francisco Amount. outstanding exchange Railroad Company: Refunding Mortgage Four Per Cent \$68,557,000 \$17,139,250 Cent Gold Bonds...... Kansas City, Fort Scott and Mem-19,658,568 69,384,000 phis Railway Company Guaranteed Four Per Cent Preferred 3,750,000 Stock Certificates..... 15,000,000 \$40,547,818

[fol, 413] Convertible Income Mortgage Gold Bonds (Ranking for Interest from July 1, 1915)

To be used in partial exchange for

Series A, Five Per Cent, due 1960, redeemable at par, and interest for proportionate part of current semi-annual interest period.

St. Louis and San Francisco Railroad Company:	Amount outstanding	income mort	ible 5% tgage bonds
General Lien 15-20 Year Five Per Cent Gold Bonds For adjustment of Outstanding In-	\$69,384,000	\$38,161,200	
debtedness, any bonds not so used to be available for the corporate purposes of the New Company		500,000	\$38,661,200
Preferred Stock	, Six Per Co	ent	
For adjustment of Outstanding In- debtedness, any stock not so used to be available for the corporate purposes of the New Company Common			7,000,000
Sold to Purchase Syndicate and by it to be offered for subscription to stockholders of the Railroad Com- pany on the terms and conditions stated in the Plan		47,700,000	
to be available for the corporate purposes of the New Company		5,300,000	53,000,000

XVII. The capitalization and interest charges of the New Company upon the consummation of the reorganization and upon the retirement of the \$287,286,386 of securities dealt with under the Plan will be as follows:

#### Fixed Charge Obligations

		Annual fixed charge	
\$93,398,500			
25,000,000	Series A 4% Prior Lien Mortgage Bonds, Series B, 5%, sold to provide cash requirements of the plan	\$3,735,940 1,250,000	
[fol. 414]	leaving undisturbed with bonds reserved under the Prior Lien Mortgage to take up same at or before maturity.		
9,484,000	St. Louis & San Francisco Railway Company General Mort- gage 5% and 6% Bonds ma- turing 1931.	511,010	
5,306,000	Equipment Trust Certificates maturing after July 1, 1917 (about)	265,000	
	Sundry Rentals and Sinking Funds (year 1915)	579,119,26	\$6,341,069,36
133,188,500	The Fixed Charges in connecti- Kansas City, Fort Scott & Mem Company Leasehold and Au- panies' Bonds, Rentals, Sinkin Miscellaneous, as stated in det graph XIII hereof.	phis Railway kiliary Com- g Fund and tail in para-	2.817,120.32
	Total Fixed Charges of Ne	ew Company.	9,158,189.68
	Contingent Charge Obliga	ations	
40,547,818 38,661,200	6% Cumulative Adjustment Mortgage Bonds 5% Non-Cumulative Convertible	\$2,432,869.08	
		1,933,060	
	Total Contingent Charge Company		4,365,929.08
	Total Charges, Fixed and of New Company		13,524,118,76
	and the following amount	of Stock:	
	6% Preferred Stock Common Stock		

272,397,518 Total.

XVIII. This capitalization will have provided new cash to the amount of \$25,000,000 which it is estimated will be necessary in connection with carrying out the Plan and which will be applied toward the payment of existing obligations and otherwise substantially as follows:

Receivers' Certificates	\$3,000,000
Equipment Trust Obligations maturing after January 2, 1916, and prior to July 2, 1917	3,232,636
\$54,000 Pemiscot Railroad Company First Mortgage Six Per Cent Gold Bonds	54,000
\$65,000 Kennett & Osceola Railroad Company First Mortgage Six Per Cent Gold Bonds \$4,500 Southern Missouri and Arkansas Rail-	65,000
road Company First Mortgage Bonds July 1, 1914, January 1, 1915, and July 1, 1915,	4,500
interest on the Refunding Mortgage Bonds. May 1, 1914, and November 1, 1914, interest on	4,113,420
the General Lien Bonds	3,469,200
[fol. 415] Interest at 6% per annum on fore- going interest instalments from date of ma- turity to date of actual payment, calculated	
as of January 1, 1916	541,688
underlying bonds	310,650
cured Debt, Judgments and Preferred Claims	2 000 000
(estimated) January 1, 1916, interest on \$68,763,750 Prior	2,000,000
Lien Mortgage Four Per Cent Bonds, Series A, deliverable in partial exchange for Refunding Mortgage Bonds and for General	
Lien Bonds pursuant to the Plan Improvements and betterments, additions, ac-	1,375,275
quisitions including equipment, court costs and other legal expenses, including compen-	
sation and disbursements of trustees of	
existing mortgages; Reorganization Managers' compensation; Syndicate commissions;	
engraving of new securities; accountant and other expert fees and expenses; charges for	
listing securities on various stock exchanges; compensations and disbursements of commit-	

6,832,621

\$25,000,000

The Receivers of the Railroad Company estimated that on January 2, 1916, the cash in hand, after providing funds for payment of Equipment Trust Obligations maturing up to January 2, 1916, inclusive, of interest on securities poid regularly during the receivership, and of the cost of current improvements, will be not less than the sum of \$3,500, 000, the greater part of which should be available for the corporate purposes of the New Company.

XIX. Upon the issue of the new securities as bereinkefore stated, the capitalization and interest charges of the New Company will compare with the capitalization and interest charges of the Railroad Company as follows:

Capitalization of Railroad Company (excluding K. C., Ft. S. & M. System Bonds undisturbed) \$302,076,386 00

Capitalization of New Company (excluding K. C., Ft. S. & M. System Bonds undisturbed) 272.3

and the same

Capitalization of Railroad Company (including K. C., Ft. S. & M. System Bonds undisturbed) . 8256,826,626 ac

Capitalization of New Company (including K. C., Ft. S. & M. System Bonds undisturbed)

327.211.100 00

[fol. 416] Fixed charge obligations of Railroad Company (excluding K. C., Pt. 8, & M. System Bonds undisturbed) 8252.076.386.00

Fixed charge obligations of New Company (excluding K. C. Pt. S. & M. System Bonds undisturbed)

133,188,500.60

Final charges of Railroad Company (exclading K. C. Pt. S. & M. Seystom Bonds mudisturbed)

发展之间经济(200亩 300)

Fixed charges of New Compart tescholing K. C., Pt. S. & M. Nystem Bonds un-

disturbed) 96,381,069 36

Continuous charges of New

Company - 4,365,329 08

Total interest charges—fixed and contingent-of New Company

表现17,万166,18160 组织

Fixed charges of Railroad Company (inrhaling K. C., Pt. S. & M. Systom Bonds 20 H CONT. NO. 100 andistarbed)

Flored charges of New Class. pasy (including K. C., Ft. S. & M. System Bonds undis-

turbed) 90,17e,34h de

Washington obsequences of New

Company - 4,365,020 (08)

Total charges—fixed and contingent—of North Classic patricit

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XX. The Plan of Reorganization is thus designed to effect a reduction of the capitalization to an amount well within the value of the property and such a decrease in the anomal fixed interest charges as will be well within the carning esqueity of the New Company. The conteastion of banded indebtuduess bearing a fixed interest is accomplished by the provisions of the Plan that holdlers of the present Refunding Meetgage Bonds shall assent for an presimately 25% of their present bonds and hulders of the present General Lion Bonds shall accept for approximately 73% of their present bands, bonds the interest upon which is payable only out of income. The tables hereful often set forth show that the following reductions will be accom-| Sall 487 | petioderell for Char divertigental particular

(a) Reduction in total capitalization (excluding K. C., Ft. S. & M. System Bonds undisturbed), \$29,678,868 or 9,825.

(b) Reduction in total capitalization (including K. C., Pt.
 & M. System Bonds undisturbed), \$29,678,868 or 8,317.

- (c) Reduction in fixed charge obligations (excluding K. C., Ft. S. & M. System Bonds undisturbed, \$118,887,886 or 47.16%.
- (d) Reduction in fixed annual charges (excluding K. C., Ft. S. & M. System Bonds undisturbed), 85,728,135 or 47,46%.
- (e) Reduction in total annual charges, fixed and contingent (excluding K. C., Ft. S. & M. System Bonds undisturbed), \$1,362,205.92 or 11.28%.
- (f) Reduction in fixed annual charges (including K. C., Ft. S. & M. System Bonds undisturbed), 85,728,135 or 38,47%.
- (g) Reduction in total annual charges, fixed and contingent including K. C., Pt. S. & M. System Bonds undisturbed), \$1,362,265.92 or 9.15%.

The present fixed charge obligations secured upon the property of the Railroad Company system, excluding the K. C., Pt. S. & M. System, are at the rate per mile of first main track of, 862,800.95.

These bear fixed annual charges at the rate per mile of first main track of \$3,050.47.

As a result of the reorganization the New Company will have outstanding fixed charge obligations secured upon the property of the System, excluding the K. C., Pt. S. & M. System, at the rate per mile of first main track owned by the New Company of \$33,762.54.

These will bear fixed annual charges at the rate per mile of first main track of \$1,007.43.

The present fixed charge obligations secured upon the property of the Railroad Company's system, including the K. C., Ft. S. & M. System, are at the rate per mile of first main track of \$59,525.85.

These bear fived annual charges at the rate per mile of first main track of \$2,887.20.

As a result of the reorganization the New Company will have outstanding fixed charge obligations scenred upon the [fol. 418] property of the Railroad Company's system, including the K. C., Pt. S. & M. System, at the rate per mile of first main track owned or operated by the New Company of \$36,471.92.

These will bear fixed annual charges at the rate per mile

of railroad of \$1,776.66.

The amount of fixed charge obligations per mile of railroad owned by the New Company will compare very favorably with those of other railroad companies in the same territory, as shown in the following table:

Name of company	Fixed charge obligations per mile of read
New Company (excluding K. C., Pt. S. & M. System Bonds undisturbed) New Company (including K. C., Ft. S. & M.	\$33,762 64
System Bonds undisturbed) Missouri Pacific Railway Company St. Louis, Iron Mountain & Southern Railway	36,471 92 73,913.00
Company	45,070 00 47,611 00

XXI. The consummation of the reorganization will also have resulted in the payment in each of approximately \$16,700,000 of secured and preferred claims and will have provided a capital resource, first through the New Prior Lien Mortgage Bonds and then through the Adjustment Mortgage Bonds and Income Mortgage Bonds, for the acquisition of additional equipment, improvements and betterments and new mileage to meet the growing requirements of the New Company's business and the demands of shippers and the public, which will arise out of the growth and development of the territory which it serves.

XXII. The Plan provides for the participation in the reorganization of the holders of all securities which are not to
remain undisturbed, including both the preferred and common stock, and provision is made permitting the Reorganization Managers to make adjustments with the holders of
mascured debt when the establishment of their claims under the general eraditors bill shall have proceeded to a
point making it practicable to do so. Preferred and common stock of the New Company is reserved for that purpose.

XXIII. A thorough and complete examination of the property of the Railroad Company has been made by a competent expert who expresses confidence in its value and [fol. 419] future. As a result of the report of this expert plans have been made for the further betterment and development of the property of the System, including reduction of grades, the elimination of grade crossings, the rebuilding of bridges and trestles, the installation of block signals and improved dispatching systems, repairing and rebuild. ing of equipment and the purchase of additional equipment at the rate of an annual expenditure of approximately \$5. 000,000 for the next five years, and also for radical savings in operating charges, both through the improvements above outlined and through increased efficiency in various departments. The resources to enable the carrying out of this plan of betterments and improvements are provided through the cash to be raised and the securities reserved under the Plan of Reorganization.

XXIV. The System of the Railroad Company lies in a rapidly growing country with natural resources, the development of which promises a constantly increasing freight and passenger traffic to the System. Mr. J. W. Kendrick, in his report on the System, says:

"From an agricultural standpoint the Frisco is located as well or better than any of its neighbors serving the same territory.

With respect to the industrial development of its local territory it is believed to have made more rapid progress during the last few years than any other western line.

Based on past experience and statistics as to the growth of the country it is not unreasonable to expect that the tonnage handled by the System should increase at the rate of ten per cent, yearly for several years to come.

It serves the best of the coal fields in Kansas, Arkansas and Alabama, and also reaches the Oklahoma fields.

It reaches the heart of the gas belts of Kansas and Oklahoma.

The largest oil fields in Oklahoma are on its line, and much of the new development is tributary to its rails.

The lead and zinc deposits of the Joplin District are reached by it.

The last census showed that in the counties in Missouri traversed by the Frisco the population increased from 1,-[fol. 420] 739,818 to 2,010,424, or 16%. A remarkable feature was that practically all the Frisco counties showed increased population while other counties showed decreases.

The five counties in Alabama through which the Frisco

rnns increased 49%.

In Arkansas the increase along the Frisco rails was 22%. In Oklahoma the increase from 1907 to 1910 was 22%.

In four counties in southeast Missouri in the drainage districts the increase was 57%, and in the 12 counties in Arkansas and Missouri in the drainage districts the increase was 44%.

From the best information obtainable, the increase at the present time is equal to and in some cases in excess of that

during the period shown.

The general territory of the System is susceptible of vast development and capable of producing a great deal more tonnage than at present, both on account of the large area of land which is not now tilled and that which can be tilled more extensively. The western portion of the territory served by the System, especially in Oklahoma, is as yet

sparsely populated.

The most rapid increase in population, the most rapid development agriculturally and the greatest relative increase in the distribution of merchandise will occur in Oklahoma, and by reference to the map it will be found that the Frisco lines traverse this rich state in a very effective and comprehensive manner. The development of the oil districts in this state is progressing rapidly, and there is certain to be a continued increase in the production of oil in the recently exploited fields for many years to come. As stated, Oklahoma is sparsely populated at present. The richness of its soil makes it certain that its population, productivity and wealth will be enormously increased.

Adjacent to the west bank of the Mississippi River, from Cairo south, is an area of approximately 20,000,00- acres of the most productive soil known. For years the Mississippi Valley has been retarded in its development by frequent inundation. The floods of the last two years have been so severe as to bring the attention of the entire nation

to the question of their prevention, and with protection will come reclamation, and this vast body of land of such extreme fertility will, under development, add largely to the

traffic possibilities of the Frisco.

[fol. 421] The drainage projects in Missouri and Arkansas contemplate the construction of 940 miles of main drainage ditches at an estimated expense of \$25,000,000 which will open to cultivation more than 3,600,000 acres of the best and most fertile land in the United States, most of which will be more conveniently served by this System than by any other road. The work was started about two years ago and is now well under way. The St. Louis and San Francisco Railroad has over 600 miles in this alluvial soil belt.

Agriculturally the increase may be looked forward to with absolute certainty from increased population, increased acreage in cultivation, increased yield per acre, drainage projects, levee protection, improved methods, diversification of crops, intensive farming and selection of suitable crops.

Farming is becoming more profitable each year and is attracting a more intelligent and adaptable class of people.

The territory served by the Frisco is adapted to the growing of all the staple crops.

Probably not to exceed twenty per cent. of the available acreage tributary to the Frisco is now in cultivation.

As previously stated, Oklahoma perhaps offers as great possibilities as any part of the territory. Of the 1,500 miles of Frisco lines in this state 600 miles are in the western part and are just beginning to show the results of intelligent farming and effort. Drought and the failure to realize the necessity for planting the right sort of crop have discouraged the shiftless and hit-or-miss farmer and his place is being taken by the man who studies the conditions and only tries to grow those crops which experience has shown will succeed.

The Ozarks, usually considered only as a scenic attraction, with the exception of a limited amount of fruit growing, are beginning to come into their own. The commercial clubs and bankers' associations are bringing the possi-

bilities of this section in fruit growing, vineyards, poultry, dairying and cattle raising to the attention of the people, and an appreciable movement has already begun. The Frisco has several hundred miles of road in the Ozarks. The climate, soil and water conditions and the marketing opportunities are admitted to be of the best."

[fol. 422] The lines of the Railroad Company in many instances offer the shortest routes between important industrial centers. For instance, the Railroad Company offers the shortest line between St. Louis and Memphis, St. Louis and Dallas, St. Louis and Fort Worth, St. Louis and Joplin, St. Louis and Oklahoma City, Kansas City and Memphis, Memphis and Joplin, and Memphis and Tulsa, and its lines from Kansas City to Fort Worth, from Kansas City to Oklahoma City and from Kansas City to Tulsa are but little longer than those of the more favorably situated competitors. The relations of the Railroad Company with its connecting carriers are extremely friendly and it has preferential traffic arrangements with some of its more important connections which are greatly to the advantage of all parties.

XXV. The elements or factors which are entitled to consideration under the terms of the Missouri Public Service Commission Act in arriving at a determination of the fair value of the property, are as follows:

- (a) Original cost of construction.
- (b) Duplication cost.
- (c) Present condition.
- (d) Earning power at reasonable rates.

### (a) Original Cost of Construction:

The Railroad Company, as at present constituted, includes a large number of lines which were originally constructed independently and were subsequently united into the single system. The System is the outcome of a reorganization of the property taken over by the Railroad Company upon its organization, the purchase of various lines, many of which had been in existence for many years and had themselves gene through reorganizations, and the purchase or building of new lines within more recent years.

So many of the lines of the System were constructed over thirty years ago and have been practically rebuilt since then that there are no adequate records or data available from which the original cost of the property can be ascer. tained with any substantial degree of accuracy. to the Railroad Company of its lines of railway has been approximately \$253,251,255 and the cost of its equipment \$50,184,703, making the total book value of its property. [fol. 423] exclusive of securities of proprietary, affiliated and controlled companies and other investments, \$303,435. 958. Including such securities the total book value of all the property of the Railroad Company to be embraced in the reorganization is \$305,935,958. The present capitalization of the Railroad Company is represented by securities. both bonds and stock, which were issued in the prior reorganization as consideration for the property acquired by the present company or which have been issued on the refunding of such securities, and also additional securities issued from time to time on the acquisition of additional railroads and property. As hereinbefore stated, none of the present capitalization represents any franchise or permit.

## (b) Duplication cost:

It appears from the report made to the petitioners by W. C. Nixon, one of the Receivers of the Railroad Company, that the value of the physical property used for railroad purposes in connection with the System to be embraced in the reorganization (including the K. C., Ft. S. & M. System) on the basis of cost of reproduction, is \$319,-276,000, and that the value of securities representing propperty not embraced in the above mentioned valuation and other miscellaneous property which it is contemplated the New Company will acquire, is of the value of at least \$2,-500,000. The appraised value of the property to be acquired by the New Company plus the cash which it is contemplated it will receive from the Receivers and the estimated amount of new cash provided for in the Plan, is thus in excess of the proposed capitalization of the New Company.

## (c) Present condition:

The plans which have been made for the betterment and improvement of the property have already been pointed out. The Receivers have been following these plans so far as possible since their appointment and advise that they have made large expenditures on account of maintenance of way and maintenance of equipment in order to improve the property generally. They have furnished the following table showing amounts (stated in thousands) expended and charged to operating expenses during the last four fiscal years:

[fol. 424]				Maintenance of way	Maintenance of equipment	Total
Year ending Year ending Year ending	June June	30, 30,	1913 1914	5,755,000 7,762,000	\$5,521,000 6,091,000 7,492,000	\$10,639,000 11,846,000 15,254,000
Year ending					7,162,000	13,250,000

The amount charged to Operating Expenses for Maintenance of Way and Equipment during the period of Receivership compares with previous years as follows:

Yearly average for two years ending June 30, 1913 (Prior to Receivership) \$11,242.000 Yearly average for two years ending June 30, 1915 (During Receivership) 14,252,000

The Receivers advise that during the years 1913, 1914 and 1915, there has been expended in the redemption of equipment trust obligations and for improvements and additions to property, the sum of \$8,155,939.24, which has not been taken into the capital account.

As a result of the improvements already made, the condition and earning capacity of the property has been notably advanced and now compares favorably with the physical condition of neighboring lines.

### (d) Earning power at reasonable rates:

Attention has already been called to the character of the territory in which the System of the Railroad Company lies and to the assurance which it gives of increased business for the System. Mr. Kendrick, in his report which has already been mentioned, says:

"With the opportunities and advantages offered in the Frisco territory, the System should certainly give as good an account of itself as any in the country and certainly justify the estimate for a large increase in each succeeding year."

The officials of the Railroad Company have certified that the income account for four years ended June 30, 1915, after eliminating all items in connection with Chicago and Eastern Illinois Railroad stock, the New Orleans, Texas and Mexico lines and New Orleans Terminal Company (which it is not intended to vest in the New Company) is as follows:

Operating Revenue	June 30, 1912	June 30, 1913	Year ending June 30, 1914	Year ending June 30, 1915	Average of
:	\$41,764,802.84 335,560.89	\$45,690,972.46 359,317.57	\$44,556,234,12 367,334,57	\$42,677,323,13 297,249,58	\$43,672,333,14 339,865.65
Operating expenses, including taxes 30,	42,100,363,73 30,667,171,89	46,050,290,03 32,768,534,41	44,923,568,69 35,419,814,82	42,974,572,71 31,875,648,66	44,012,198.79 32,682,792,45
Operating income Other income less hire of equipment	11,433,191,84 685,470,76	13,281,755,62 889,540,48	9,503,753,87 655,191,42	11,098,924.05 571,842.70	11,329,406,34
Total Income	,118,662.60	14,171,296,10	10,158,945,29	11,670,766.75	12,029,917, (8
Add difference between rental paid to Frisco Construction Company (all of whose stock is owned by St. Louis and San Francisco Railroad Company, and the interest on Construction Company Equipment Cerrificates outstanding at the time and which are to be retired or provided for in the plan	SI,308,84	48,733.30	51.082.79	*29,084,12	38.010.20
12.	199,971,44	12,199,971.44 14,220,029.40	10,210,028,08	11,641,682,63	12.067.927.88
Add for estimated net carnings of Quanab, Acme and Pacific Railway	d Pacific R	ailway			75,000,00
* Deduct.					12,142,927.88

preclation and obsolescence, a total of \$1.977,700.52, of which \$1,426.827.30 was charged to operating expenses and \$550.

It will be seen from the above table that the net income in each of the four years greatly exceeds the total fixed charges which will be borne by the New Company upon the consummation of the reorganization; and it has been estimated by experts that the New Company's net operating income can reasonably be expected so to increase from year [fol. 426] to year as to provide, within a comparatively short time, a substantial margin over all charges, both fixed and contingent.

Wherefore, the Reorganization Managers pray:

- (a) That the reorganization of St. Louis and San Francisco Railroad Company set forth in the Plan of Reorganization submitted herewith, and said Plan, be approved and authorized.
- (b) That the amount of capitalization of the New Company as set forth in said Plan, as well as the issue of all stocks and bonds and the execution and delivery of the mortgages therein set forth or mentioned, be authorized.
- (c) That such further order or relief may be granted as may be just and proper.

Dated November 12, 1915.

J. & W. Seligman & Co., by (Signed) Frederick Strauss. Speyer & Co., by (Signed) Henry Ruhlender.

STATE OF NEW YORK,

City and County of New York, ss:

Subscribed and sworn to before me this twelfth day of November, 1915.

(Signed) Francis F. Randolph, Notary Public, New York Co., No. 3344. Commission expires Mar. 30, 1916.

STATE OF MISSOURI:

Office of the Public Service Commission

I have compared the preceding copy with the original on file in this office, and I do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and seal of the Public Service Commission, at Jefferson City, this 25th day of August 1924.

J. P. Painter, Secretary. (Seal.)

# [fol. 427] Before the Public Service Commission of the State of Missouri

#### No. 974

In the Matter of the Application for Authorization of the Reorganization of St Louis and San Francisco Railboad Company and for an Order Authorizing the Issue of Stocks and Bonds

May 15, 1916.

The application of J. & W. Seligman & Co. and Speyer & Co., as Reorganization Managers under a Plan and Agreement of Reorganization, dated November 1, 1915, which is hereto annexed and marked Exhibit A, respectively shows:

I. The applicant, J. & W. Seligman & Co., is a co-partner-ship engaged in the business of banking, whose principal place of business and post-office address is 1 South William Street, Borough of Manhattan, City and State of New York. The applicant, Speyer & Co., is a co-partnership engaged in the business of banking, whose principal place of business and post-office address is 26 Pine Street, Borough of Manhattan, City and State of New York. The applicants have jointly been constituted Reorganization Managers under said Plan.

II. St. Louis and San Francisco Railroad Company (hereinafter called the Railroad Company) was organized June 29, 1896, under the laws of Missouri, in connection with the reorganization of St. Louis and San Francisco Railway Company.

III. The lines of railroad of the Railroad Company and of its leased and auxiliary companies all of the capital stock of which it owns, which are to be embraced in the reorganized System contemplated by the Plan, including the line of railroad of Quanah, Acme and Pacific Railway Company, extend in general from St. Louis and Kansas City, Missouri, to Wichita and Ellsworth, Kansas, Avard and Oklahoma City, Oklahoma, Quanah, Vernon, Dallas, Fort Worth and Menard, Texas, and Memphis, Tennessee, and Bir-

mingham, Alabama, and comprise about 5,154.71 miles of first main track in the following states:

[fol. 428] Arkansas	Alabama	1.42		Market Con
Kansas		6320		00
Missouri		1.713	E12)	100
Mississippi		142	860	(20)
Oklahoma		1,497	366	100
Tennessee		10	24	700
Texas		4.22	No.	.00

The Railroad Company also operates 202.86 miles of main line trackage rights in the following states:

Missouri	6.1	0	Willia.
Oklahoma	 23 7		(51)
Texas	174 (	(10)	

IV. The properties and franchises of the Railroad Conpany have been in the hands of Receivers appointed by the United States District Court for the Eastern Division of the Eastern District of Missouri since May 27, 1913. On May 1, 1914, default was made in the payment of the interest then falling due on the 869,284,000 of the Railmai Company's General Lieu 15-20 Year Five Por Cont Gail. Bonds, and on July 1, 1914, default was made in the paythe self of the profession which tall when was nived district as the \$68,557,000 of Refunding Mor-gage Gold Bonds. Xia in terest has been paid on either issue since those defaills. and the principal of both issues has become due and payable and indement therefor has been rendered against the Railroad Company. Defaults were also made in the payment of the principal and interest of the Railroad Conpany's \$2,250,000 Two Year Five Per Cout Secund this Lection and Continues I was bereit to fine Court Continues and Notes, and in the payment of interest on the Railroad Conpany's \$28,582,000 of New Orleans, Texas & Mexico Bivision First Mortgage Bonds, \$12,150,250 of Trust Coullouters for forefrested month of a harmon and therein thinn Railroad Company, and \$16,944,500 of Trust Contilions for Common Stock of Chicago and Eastern Ellinois Rali: road Company, and on the guaranty by the Radroad Company of the interest payable on \$14,000,000 of New Orlans. Taminal Company First Murigage Four For Cont Guid Books

C. In appropriates because in the Carnel 1-1 Blackers Court for said Euston, Division of the Euston, Busicist of Wissami by studients of the Rudsoud Communication a sairof the promposty of the Radboard Company for the hearth of as appullture, and by the respective intuities maker the Reand 4201 familiar Mornance and the Gonowi Laon Moremay for the forestooms of soid mortaness and the sale of the mortigaged prospectes, a Pinal Become was cultural on-Warsh 38, 2006, anticoing the sails of all property of awars dependent and description of the Rultreal Commune and providing that upon conformation of the sale all the signitific interest and capity of restoration of the Bullroni Company, its conditions and studifications, and of all automochanging under it or thou, or any of thom, of, in and to and property and every most and pureed thoroug shall be Survey Surread and Sureadingoli.

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These have now associated to said become nurities to usual Plan and the Agreement arrayced theories notifies at Rebanding Workshop Bands, from well from Bands and empiof the Railboard Company in the Sulkewing amounts—

SECRETARIO Refunding Veryange Stanto, or 98-98% and of a brief result of SEC. 207-100.

SIG 785,000 General Lieu Brank, or 20032; not at a heal some of SIG 24g,000.

\$4,473,200 par value, of First Preferred Stock, or 89.46% out of a total issue of \$5,000,000;

\$14,929,300 par value, Second Preferred Stock, or 93.3% out of a total issue of \$16,000,000;

\$27,031,800 par value, of Common Stock, or 93.21% out of a total issue of \$29,000,000;

of the \$46,284,000 General Lien Bonds, other than the [fol. 430] French Series, \$43,977,600 or 95% have been deposited under the Plan. Of the \$23,000,000 of General Lien Bonds, French Series outstanding, \$18,808,300, or 81.77%, have been deposited under the Plan. That the remaining General Lien Bonds of the French Series have not been deposited is due largely to the fact that owing to the present European war the bonds have either been lost or are held by persons who cannot be located.

Of the entire stock of the Railroad Company there has been deposited under the Plan 464,343 shares, or 92.87.

Committees representing holders of the following securities have approved the provisions of the Plan with reference to such securities:

\$23,350,000 New Orleans, Texas & Mexico Division First Mortgage Gold Bonds, or 83% out of a total issue of \$28,128,000, the remaining bonds being largely held in France and either lost or held by persons who have not been located.

\$2,075,000 Two Year Five Per Cent Secured Gold Notes, or 92.22% out of a total issue of \$2,250,000;

\$2,565,000 Two Year Six Per Cent Secured Gold Notes, or 98.65% out of a total issue of \$2,600,000;

\$25,287,050 St. Louis & San Francisco Railroad Company Trust Certificates for Preferred and Common Stock of Chicago & Eastern Illinois Railroad Company, or 95.07% out of a total issue of \$26,598,250 in the hands of the public;

\$2,779,000 Ozark & Cherokee Central Railroad Company First Mortgage Five Per Cent Gold Bonds, or 96.5% out of a total issue of \$2,880,000.

It is intended by the Reorganization Managers to purchase at the sale referred to in Paragraph V, the lines of railroad of the Railroad Company and such other of its property as they may deem advisable and to transfer and

convey the property so purchased to a New Company which will issue to the Reorganization Managers in consideration for such property and for approximately \$13,500,000 cash which will be turned over to it or applied to its capital purposes out of the new cash provided by the Plan and the cash which it is estimated the Receivers will have on hand, its securities and stock as follows:

\$93,398,500 Prior Lien Mortgage Bonds, Series A, 4 per cent.

25,000,000 Prior Lien Mortgage Bonds, Series B, 5 per cent.

40,547,818 Adjustment Mortgage Bonds, 6 per cent.

[fol. 431]

35,192,000 Non-Cumulative Income Mortgage Bonds, 6 per cent.

7,000,000 Non-Cumulative Preferred Stock, 6 per cent. 48,480,000 Common Stock.

together with such additional amounts of Preferred Stock and Common Stock as may be required by the Reorganization Managers to settle claims of general creditors of the Railroad Company.

VII. Of the 5,358.17 miles of railroad constituting the Railroad Company's System and included in the reorganized System as stated in paragraph III, the lines of railroad owned directly by the Railroad Company comprise 3,522.59 miles of first main track.

VIII. The Railroad Company owns the entire capital stock of Kansas City, Fort Scott & Memphis Railway Company which in turn owns the entire capital stock of Kansas City, Memphis & Birmingham Railroad Company and of Kansas City and Memphis Railway & Bridge Company which owns the bridge over the Mississippi River near Memphis. The Railroad Company operates the lines of railroad of those Companies under ninety-nine year leases. These lines contitute approximately 1,210 miles of first main track, running in general from Kansas City, Missouri, to Memphis, Tennessee, and Birmingham and Bessemer, Alabama. The Railroad Company also owns the entire capital stock of Birmingham Belt Railroad Company, which operates a belt and terminal system in the City of Birmingham, consisting

of about fourteen acres of well located real estate, and 39.01 miles of track, serving thirty-four industries.

The properties described in this paragraph VIII are herein collectively called the K. C., Ft. S. & M. System.

IX. The Railroad Company owns the entire capital stock of the following companies which operate lines of railroad in Texas

Fort Worth and Rio Grande Railway Company 223.44 miles.

Brownwood North & Souther- Railway Company 17.65 miles.

St. Louis-San Francisco & Texas Railway Company 85.32 miles.

Paris & Great Northern Railway Company 16.94 miles.

X. The Railroad Company owns or has interests in valuable terminals and terminal facilities at St. Louis, [fol. 432] Kansas City, Wichita, Memphis, Birmingham, Dallas and other points on the lines of the system.

XI. The Plan which is submitted herewith contemplates that all the lines of railroad and interests hereinbefore in paragraphs VII to X, inclusive, described shall be included in the reorganized System either by direct ownership or by ownership through securities or by the continuance of existing leases and their transfer to the New Company contemplated by the Plan, the bonds of the K. C., Ft. S. & M. System, however, to remain undisturbed.

XII. The Railroad Company also owns \$6,777,800 of common stock and \$8,102,500 of preferred stock of Chicago & Eastern Illinois Railroad Company, for which the Railroad Company issued its stock trust certificates to the amount of \$16,944,500 for common stock and \$12,153,750 for preferred stock, these certificates bearing guaranteed dividends at the rate of four per cent. per annum.

The Railroad Company also owns the entire capital stock of New Orleans, Texas & Mexico Railroad Company and has issued \$28,128,000 of its New Orleans, Texas & Mexico Division First Mortgage Gold Bonds, secured by a first mortgage on the property of the latter Company. In July, 1913, the New Orleans, Texas & Mexico lines were placed in the hands of separate receivers. They have been operated

independently of the Railroad Company's system since then, and are now in process of separate reorganiaztion.

The difficulties of the Railroad Company were in large measure due to the failure of the Chicago and Eastern Illinois and New Orleans, Texas and Mexico Systems to earn the fixed charges which the Railroad Company had assumed in connection with its acquisition of interests therein, and it is not intended that the lines of those systems or the property of the New Orleans Terminal Company (which is operated in connection with the New Orleans, Texas & Mexico System), shall be included in the reorganization.

XIII. The capitalization of the Railroad Company as of June 30, 1915, (including equipment trust obligations and receivers' certificates and including the bonded debt of Quanah, Acme and Pacific Railway Company but excluding the outstanding \$100,000 of capital stock), aggregated \$356,890,056, upon which the Railroad Company bore fixed charges aggregating \$14,886,324 for a detailed statement of which reference is made to page 30 of the Plan. It ap-[fol. 433] pears from the petition of the Railroad Company filed with this Commission on or about May 27th, 1913, in connection with an appliication for authority to issue and sell \$761,000 New Orleans, Texas and Mexico Division First Mortgage Gold Bonds, that none of the outstanding stock or stock certificates or bonds, notes or other evidences of indebtedness of the Railroad Company have been issued or used in capitalizing the right to be a corporation or any franchise or permit or the right to own, operate or enjoy any such franchise or permit, or any contract, consolidation or lease.

Of the present capitalization the Plan contemplates that there shall be left undisturbed in the reorganization, securities of the Railroad Company to the amount of only \$14,790,000 (\$9,484,000 St. Louis & San Francisco Railway Company General Mortgage 5 per cent. and 6 per cent. Bonds maturing 1931, and \$5,306,000 Equipment Obligations maturing after July 1, 1917) together with the \$54,813,670 of bonds of the Kansas City, Ft. Scott & Memphis System.

XIV. As more fully set forth in the Plan, new securities will be created by the New Company as follows:

(1) Prior Lien Mortgage Bonds, limited to \$250,000,000 at any one time outstanding and secured by mortgage and deed of trust embracing all or substantially all the lines of railroad, franchises and equipment, terminals and other property (including stocks and bonds), except as otherwise dealt with under the Plan, acquired by the New Company pursuant to the Plan and also all additional property of every character (including stocks and bonds) at any time thereafter acquired by the New Company. On the Prior Lien Mortgage Bonds there are to be issued in the reorganization:

Series A, 4%, maturing July 1, 1950, redeemable at par with accrued interest \$93,398,500 Series B, 5%, maturing July 1, 1950, redeemable at 105 with accrued interest 25,000,000

\$118,398,500

(2) Adjustment Mortgage Bonds, limited to \$75,000,000 at any one time outstanding and secured by mortgage and deed of trust on the properties embraced in the Prior Lien Mortgage and from time to time becoming subject thereto, subject to the Prior Lien Mortgage. The Adjustment Mortgage Bonds are to bear interest payable prior to the maturity of the principal, only out of the Available Net [fol. 434] Income of the New Company as shall be defined in the Adjustment Mortgage. The interest on the Adjustment Mortgage Bonds will be cumulative. On the Adjustment Mortgage Bonds there are to be issued in the reorganization:

Series A, Six Per cent., carrying interest from July 1, 1915, maturing July 1, 1955, and redeemable at par and accrued interest, \$40,547,818.

(3) Income Mortgage Bonds, limited to \$75,000,000 at any one time outstanding and secured by mortgage and deed of trust on the properties embraced in the Prior Lien Mortgages and from time to time becoming subject thereto, subject to the Prior Lien Mortgage and the Adjustment Mortgage. The Income Mortgage Bonds are to bear interest, payable only out of the Available Net Income of the New Company as shall be defined in the Income Mortgage, but only after the payment therefrom of all interest on the

Adjustment Mortgage Bonds. The interest on the Income Mortgage Bonds will not be cumulative. Of the Income Mortgage Bonds there are to be issued in the reorganization:

Series A, Six Per Cent., ranking for interest from July 1, 1915, maturing July 1, 1960, redeemable at par, and interest for proportionate part of current interest period, \$35,-192,000.

(4) Preferred Stock to an authorized amount not exceeding \$200,000,000, entitled to receive for any fiscal year dividends at such rate not exceeding Seven Per Cent. per annum, as may be from time to time determined by the Board of Directors at the time of issue thereof and stated in the certificates therefor but such dividends will not be No dividend shall be paid on the Preferred Stock for any fiscal year other than out of the net income for such fiscal year applicable to the payment of dividends, unless for the two fiscal years next preceding, the full interest shall have been paid on the outstanding income The Preferred Stock may be made in Mortgage Bonds. whole or in part redeemable at the election of the Company on such terms, on such notice and at such premiums as the board of directors may determine. Of the Preferred Stock there will be issued in the reorganization:

Six Per Cent. Stock, redeemable, if allowed by law, at part and proportionate dividend for current dividend period, \$7,000,000.

[fol. 435] (5) Common Stock to an authorized amount not exceeding \$250,000,000, of which there will be issued in the reorganization \$48,480,000.

For a statement of the disposition to be made by the Reorganization Managers of the securities to be issued to them by the New Company in consideration for cash and properties as hereinbefore stated, reference is made to the Plan.

XV. Upon the consummation of the reorganization and the retirement of the securities dealt with under the Plan the aggregate capitalization of the New Company, excluding K. C., Ft. S. & M. System Bonds which are to be undis-

turbed, will be approximately \$264,408,318, or a reduction of 12.47% in the present capitalization, while the capitalization of the New Company, including K. C., Ft. S. & M. System Bonds, will be approximately \$319,221,988, or a reduction of 10.55%. The annual fixed charges of New Company, including K. C., Ft. S. & M. System Bonds, will be approximately \$9,158,189.68 or a reduction of 38.47% from the fixed charges of the Railroad Company, while the total annual charges—fixed and contingent—of the New Company will be approximately \$13,702,578 or \$1,183,745 less than the annual fixed charges of the Railroad Company. For a detailed statement of the capitalization of the New Company upon the consummation of the reorganization reference is made to page 31 of the Plan.

XVI. In another proceeding with reference to a proposed reorganization of the Railroad Company, the Public Service Commission of Missouri, by an order entered February 29, 1916, modifying its order of December 22, 1915, decided that the then value of the property proposed to be embraced in the reorganization was sufficient to warrant the issue by a new company acquiring it, of securities and stock to an aggregate par value of \$321,688,886.

The elements or factors which are entitled to consideration under the terms of the Missouri Public Service Commission Act in arriving at a determination of the fair value of the property, are as follows:

- (a) Original cost of construction.
- (b) Duplication cost.

[fol. 436] (c) Present condition.

- (d) Earning power at reasonable rates.
  - (a) Original cost of construction:

The Railroad Company, as at present constituted, includes a large number of lines which were originally constructed independently and were subsequently united into the single system. The System is the outcome of a reorganization of the property taken over by the Railroad Company upon its organization, the purchase of various lines, many of which had been in existence for many years

and had themselves gone through reorganizations, and the purchase or building of new lines within more recent years. So many of the lines of the System were constructed over thirty years ago and have been practically rebuilt since then that there are no adequate records or data available from which the original cost of the property can be ascertained with any substantial degree of accuracy. to the Railroad Company of its lines of railway has been approximately \$253,251,255 and the cost of its equipment \$50.184,703, making the total book value of its property exclusive of securities of proprietary, affiliated, and controlled companies and other investments, \$303,435,958. such securities the total book value of all the property of the Railroad Company to be embraced in the reorganization (other than approximately \$13,500,000 of cash) is \$305,-The present capitalization of the Railroad Com pany is represented by securities, both bonds and stock, which were issued in the prior reorganization as consideration for the property acquired by the present company or which have been issued on the refunding of such securities, and also additional securities issued from time to time on the acquisition of additional railroads and property. hereinbefore stated, none of the present capitalization represents any franchise or permit.

# (b) Duplication cost:

It appears from a report made to the petitioners by W. C. Nixon, one of the Receivers of the Railroad Company, that the value of the physical property used for railroad purposes in connection with the System to be embraced in the reorgaization (including the K. C., Ft. S. & M. System) on the basis of cost of reproduction, is \$319,276,000, and that the value of securities representing property not embraced in the above mentioned valuation and other miscellaneous [fol. 437] property which it is contemplated the New Company will acquire, is of the value of at least \$2,500,000. The appraised value of the property to be acquired by the New Company plus the \$13,500,000 cash which it is contemplated it will receive or which will be applied to its capital purposes from the Receivers' cash and the new cash provided for in the Plan, is thus considerably in excess of the proposed capitalization of the New Company.

#### (c) Present condition:

A thorough and complete examination of the property of the Railroad Company has been made by a competent expert, Mr. J. W. Kendrick, who expresses confidence in its value and future. As a result of his report plans have been made for the further betterment and development of the property of the System, including reduction of grades, the elimination of grade crossings, the rebuilding of bridges and trestles, the installation of block signals and improved dispatching systems, repairing and rebuilding of equipment and the purchase of additional equipment at the rate of an annual expenditure of approximately \$5,000,000 for several years, and also for radical savings in operating charges. both through the improvements above outlined and through increased efficiency in various departments. The resources to enable the carrying out of this plan of betterments and improvements are provided through the cash to be raised and the securities reserved under the Plan of Reorganization. The Receivers have been following these plans so far as possible since their appointment and advise that they have made large expenditures on account of maintenance of way and maintenance of equipment in order to improve the property generally. They have furnished the following table showing amounts (stated in thousands) expended and charged to operating expenses during the last four fiscal vears.

	Maintenance of way	Mainte- nance of equipment	Total
Year ending June 30, 1912	85,118,000	\$5,521,000	\$10,039,000
Year ending June 30, 1913	5,755,000	6,091,000	11.846 000
Year ending June 30, 1914	7,762,000	7,492,000	15,254,000
Year ended June 30, 1915	0.088,000	7.162,000	13,250,000

The amount charged to Operating Expenses for Maintenance of Way and Equipment during the period of Receivership compares with previous years as follows:

Yearly average for two years ending June	30,
1913 (prior to Receivership)	\$11,242,000
Yearly average for two years ending June	30,
1915 (during Receivership)	\$14,252,000

[fol. 438] The Receivers advise that during the years 1913, 1914 and 1915, there has been expended in the redemption of equipment trust obligations and for improvements and additions to property, the sum of \$8,155,939.24 which has not been taken into the capital account.

As a result of the improvements already made, the condition and earning capacity of the property has been notably advanced and now compares favorably with the physi-

cal condition of neighboring lines.

#### (d) Earning power at reasonable rates:

Mr. J. W. Kendrick who, as hereinbefore stated, has made a thorough investigation of the Railroad Company's System, reports that the industrial development of its territory has been more rapid during the last few years than that of any other western line. He has pointed out that the system serves one of the best agricultural territories of the country in addition to coal fields in Kansas, Arkansas and Alabama, gas and oil fields in Kansas and Oklahoma and lead and zinc fields in Missouri. The territory of the system is not as yet thickly populated but is rapidly increasing in population and in the development of its agricultural lands and oil and gas fields.

Mr. Kendrick in the report already mentioned says:

"It is not unreasonable to expect that the tonnage handled by the System will increase at the rate of ten per cent, yearly for several years to come."

The Receivers have certified that the income account of the properties which are intended to be vested in the New Company for the nine months of the current fiscal year ended March 31, 1916, is as follows:

Operating Revenue		.63
Revenue from operations other than transportation		.80
Operating expenses including taxes	\$35,801,801 25,794,489	
Operating income	\$10,007,311	
Other income less hire of equipment	506,181	82
Total income	\$10.513.493	78

Add difference between rental paid Frisco Con. Co. (all of whose stock is owned by St. L. & S. F. R. R. Co.) and the interest on Construction Co. Equipment Certificates outstanding at the time and which are to be retired or provided for in the Plan

28,108 47

Add for net earnings of Quanah, Acme & Pacific Rv.

81,016 98

Total income of property to be embraced in reorganization \$10,622,619 23

[fol. 439] The net earnings during the current fiscal year have therefore been at the rate of \$14,163,492 per annum which is more than enough to provide for the entire fixed and contingent charges of the New Company and represents a return of approximately 41.2% upon the entire capitalization of the New Company. With the increased tonnage which Mr. Kendrick says can be anticipated, it is expected that the annual net earnings will in the near future exceed, \$15,000,000, and Mr. Kendrick estimates that by 1924 they should amount to \$20,000,000.

Wherefore, the Reorganization Managers pray:

- (a) That the reorganization of St. Louis and San Francisco Railroad Company set forth in the Plan of Reorganization submitted herewith, and said plan, be approved and authorized.
- (b) That the execution and delivery by the New Company organized under said Plan, of its Prior Lien Mortgage, its Adjustment Mortgage and its Income Mortgage, and the mortgaging thereunder of all of the railroads and other properties of said New Company at any time acquired by it, all as provided by said Plan, be authorized;
- (c) That said New Company be authorized to issue and deliver to the Reorganization Managers, in consideration for the property and cash to be acquired by it or applied to its use as provided in said Plan, its securities and stock as follows:

\$93,398,500 Prior Lien Mortgage Bonds, Series A, four Per Cent: \$25,000,000 Prior Lien Mortgage Bonds, Series B, Five Per Cent:

\$40,547,818 Adjustment Mortgage Bonds, Six Per Cent. \$35,192,000 Non-cumulative Income Mortgage Bonds, Six Per Cent;

\$7,000,000 Non-cumulative Preferred Stock, Six Per

Cent:

\$48,480,000 Common Stock;

together with such additional amount of Preferred Stock and Common Stock as this Commission may hereafter authorize to enable the Reorganization Managers to settle claims of general creditors of the Railroad Company.

[fol. 440] (d) That such other and further order and relief may be granted as may be just and proper.

Dated May 15, 1916.

J. & W. Seligman & Co., by Frederick Strauss, Speyer & Co., by (Just Houchens)?

STATE OF NEW YORK,

City and County of New York, ss:

Subscribed and sworn to before me this sixteenth day of May 1916.

Daniel B. O'Connor, Notary Public, New York County, No. 93. Commission expires Mar. 30, 1917. (Seal.)

STATE OF MISSOURI:

#### Office of the Public Service Commission

I have compared the preceding copy with the original on file in this office, and I do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and seal of the Public Service Commission, at Jefferson City, this 21st day of August, 1924.

J. P. Painter, Secretary. (Seal.)

Mr. Murphy: We offer in evidence, then, the applications or petitions of the St. Louis-San Francisco Railway Company, made by it or through the reorganization managers under the plan of reorganization, or made direct by the re-

organization managers, for authority to issue securities, to the Public Service Commission of the State of Missouri.

Mr. Miller: We object to them as wholly immaterial to

any issue.

The Master: They will be received subject to the objection.

To which ruling of the Master the defendant then and there excepted.

Mr. Murphy: I now offer in evidence the opinions and orders of the Public Service Commission of the State of Missouri on the applications and petitions made to the [fol. 441] Public Service Commission of Missouri by the reorganization managers, the St. Louis-San Francisco Railway Company through its reorganization managers, and the St. Louis-San Francisco Railway Company, and on the answers thereto, and on interventions filed therein, for authority to issue securities in the State of Missouri.

Mr. Miller: Same objection.

Objection overruled.

To which ruling of the Master the defendant then and there fully excepted.

Mr. Murphy: They are found in volumes 3 and 4 of the reports of the Public Service Commission of the State of Missouri.

Said applications are in words and figures as follows, to-wit:

#### Ex. 17B

## Case No. 815

In the Matter of Application of J. & W. Seligman and Company and Speyer and Company, as Reorganization Managers of the Reorganization of the St. Louis & San Francisco Railroad Company; and for an Order Authorizing the Issue of Stocks and Bonds

Submitted November 29, 1915. Decided December 22, 1915

1. Reorganization: Jurisdiction: Capitalization: Public policy: Valuation.—As long as a plan and agreement for the reorganization of a railroad corporation is within the constitutional and statutory provisions of this State this

Commission has jurisdiction and authority not only to determine the amount of capitalization and the fair value of the property included in the reorganization, but to determine whether the plan and agreement of said proposed reorganization is against public policy, and if so found to be, the Commission would be fully warranted in refusing to lend its approval to any such plan and agreement of reorganization.

- 2. Reorganization: Plan and Agreement: Valuation: Securities.—Section 62, P. S. C. L., requires this Commission to take into consideration the original cost of construction, duplication cost, present condition, earning power at reasonable rates, all other relevant matters, any additional sum or sums as shall be actually paid in cash, and may make due allowance for discount on bonds in passing upon the [fol. 442] plan and agreement for the reorganization of a railroad corporation.
- 3. Capitalization: Reorganization: Stocks and Bonds.—The term "capitalization" as used in sec. 62, P. S. C. L., relating to reorganization of railroad corporations, includes all stocks and bonds and other evidences of indebtedness, and obligations in the nature of bonds and trust certificates of a corporation undergoing reorganization are capital obligations within the meaning of said section.
- 4. Reorganization: Working capital: Efficient Organization.—Although a company may not have been working successfully financially, yet the fact that the property is being successfully operated with an efficient working organization and in need of working capital should be taken into consideration in passing upon the plan or agreement for reorganization of a railroad corporation.
- 5. Reorganization: Discount on Bonds.—Due allowance for discount on bonds should be considered along with other elements of value in passing upon the plan and agreement for reorganization of a railroad corporation.
- 6. Capitalization: Valuation: Practice and procedure.— This Commission is not bound in a rate controversy by the amount of capitalization issued by any public utility, but will take into consideration capitalization as one element

in arriving at the fair present value for rate-making purposes.

- 7. Reorganization: Fair and Equitable terms.—A plan and agreement for the reorganization of a railroad corporation should be based on fair and equitable terms, providing for the payment of all honest obligations of the old company, including the non-secured claims.
- 8. Reorganization: Constitutional law: Policy of the state.—A plan and agreement for the reorganization of a railroad corporation providing that certain bonds may be made convertible at the option of the holders into preferred stock (or, if converted during the life of the voting trust, into trust certificates therefor) without the consent of the holders of the common stock is inconsistent with the express language of sec. 10, art. XII, Constitution, and sec. 3065, R. S. 1909, and the policy of this State as thereby evidenced.
- 9. Policy of the State.—Stockholders to control corporations. It is the policy of this State that the stockholders, who own the equity in the corporation, and not the bond-[fol. 443] holders, who are interested only to the extent of their claims, shall have the control and management of the corporation.
- 10. Reorganization Expenses: Accounting.—The Commission feels that reasonable and just expenses for counsel and reorganization managers and other various necessary expenses in connection with a reorganization of this magnitude should be paid, yet it will not approve of extravagant or wasteful expenditures; and while it will authorize the blanket expenditure as provided in the petition not to exceed \$6,833,631.00, it will require that a properly itemized statement for each proposed expenditure shall be submitted to the Commission for the Commission then to determine the specific amount to be allowed therefor.
- 11. Reorganization: Stock and Bond Bonuses: Accounting: Valuation.—The Commission does not find the fair value of the property as set out elsewhere in this report to warrant the issuance of any additional amount of bonds or stocks to be given as bonuses as provided in the plan as herein proposed, and same is disallowed.

12. Reorganization: Accounting: Increase Interest Rate.—An allowance of an increase in the rate of interest from five per cent to six per cent on the ground of the disapproval of a five per cent bonus does not meet with the approval of the Commission.

13. Reorganization: Voting Trustees: Control of Company.—A plan and agreement for the reorganization of a railroad company which places the selection of voting trustees, and consequently the election of the board of directors and the management and control of the company, in the hands of the bondholders instead of the stockholders: that permits any voting trustee to "act as a director or officer of the railroad company" and to "contract with the railroad company" or "be or become pecuniarily interested in any matter or transaction in which the railroad company may be a party;" that provides that the voting trustees "assume no responsibility in respect to such management or in respect to any action taken by them or in pursuance to their consent thereto as such stockholders. or pursuant to their votes so cast, and that no voting trustee incurs any responsibility by reason of any error of law or of any matter or thing done or omitted under the agreement except for his own individual malfeasance;" and that provides that preferred stock may be issued by the voting trustees when authorized by the "holders of a majority in amount of the certificates for preferred stock outstanding. [fol. 444] and of a majority in amount of such part of the trust certificates for common stock as shall be represented at such meeting," is not approved.

Held by McQuillin, Commissioner in separate concurring opinion, that while the Commission is not a court and is not possessed of any judicial attributes whatever, it is conceded that the avowed functions of the Commission is to seek to protect the public interests, and it is idle to expect that the Commission should sanction a plan without reasonable assurance of its fairness, equity and entire legality. The legality may be ascertained only by knowing the essential mandatory legal requirements; these may be known only from an examination of the law; and the intention of the law may be arrived at only from its reasonable interpretation. Such powers may be exercised by any

public officer, whether executive or administrative or merely ninisterial. The public officer in all his official actions must follow, not disregard, the law.

H. S. Priest, R. T. Swaine and W. F. Evans for the applicants.

J. D. and L. C. Johnson for bondholders of the Cape Girardeau & Northern Railroad Company.

M. N. Sale and David Goldsmith as stockholders and other investors.

Sam Lazarus pro se.

J. A. Hope for the Cape Girardeau & Northern Railroad Company.

S. S. Gregory and S. O. Levison for B. F. Yoakum, Joseph T. Davis for Citizens Bank of Union.

## Report of the Commission

ATKINSON, Chairman, and KENNISH, Commissioner:

#### I

#### The Issues

This is a proceeding by petitions of J. & W. Seligman & Company and Speyer & Company, as reorganization managers, for the reorganization of the St. Louis & San Francisco Railroad Company, now in the hands of receivers, representing the several committees of bondhodlers and stockholders, who now come before this Commission proposing a plan of reorganization under a plan and agreement, dated November 1, 1915. It is contemplated, as set [fol. 445] forth in the petition of the applicants, that the various properties will be sold under foreclosure of the refunding mortgage, or the general lien mortgage, or both mortgages, or under the general creditor's bill, or otherwise dealt with, and a successor new company will be organized. The various details of the plan will be further stated in this opinion after we first dispose of certain questions presented for our consideration as to the jurisdiction of the Commission over the matters involved.

#### Jurisdiction of the Commission

(1) The first question presented for our consideration and investigation in this case is, what matters in it are open to our inquiry and decision? Section 62 of the Public Service Commission law of this State provides for the reorganization of railroad corporations as follows:

"Reorganizations of railroad corporations, street railroad corporations and common carriers shall be subject to the supervision and control of the Commission and no such reorganization shall be had without the authorization of the Commission. Upon all such reorganizations the amount of capitalization, including therein all stocks and bonds and other evidence of indebtedness, shall be such as is authorized by the Commission which, in making its determination, shall not exceed the fair value of the property involved, taking into consideration its original cost of construction, duplication cost, present condition, earning power at reasonable rates and all other relevant matters and any additional sum or sums as shall be actually paid in cash: Provided, however, that the Commission may make due allowance for discount of bonds. Any reorganization agreement before it becomes effective shall be amended so that the amount of capitalization shall conform to the amount authorized by the Commission. The Commission may by its order impose such condition or conditions as it may deem reasonable and necessary."

It is to be noted that the first sentence of this section provides that reorganizations of railroad corporations shall be subject to the jurisdiction and control of the Commission and that no such reorganization shall be had without the authorization of the Commission. The section further provides the rule for determining and fixing the value of the property involved in such reorganization. The section further provides that in such reorganizations the amount of capitalization, including therein all stocks and bonds and other evidence of indebtedness, shall be such as [fol. 446] is authorized by the Commission, which, in making its determination, shall not exceed the fair value of the property involved, which is to be determined by taking

into consideration its original cost of construction, duplication cost, present condition, earning power at reasonable rates and all other relevant matters, and any additional sum or sums as may be actually paid in cash. A further provision is made that the Commission may make due allowance for discount of bonds. This statute further provides that any reorganization agreement, before it becomes effective, shall be amended so that the amount of capitalization shall conform to the amount authorized by the Commission. The last sentence of the section is broad and sweeping, and provides that the Commission may by its order impose such condition or conditions as it may deem reasonable and necessary in the granting of such orders of reorganization.

A proper understanding of our statute will necessitate a discussion of some of the laws of the State of New York, from which it was taken in a large measure. The Public Service Commission law of the State of New York was enacted in 1907, and did not contain any section on the reorganization of railroads in its original enactment. In the year 1912, section 55a (chapter 289, L. 1912) was added to the New York Statute, which reads as follows:

- "1. Reorganization of railroad corporations, street railroad corporations and common carriers pursuant to sections nine and ten of the stock corporation law and such other laws as may be enacted from time to time shall be subject to the supervision and control of the Proper Commission and no such reorganization shall be had without the authorization of such Commission.
- "2. Upon all such reorganizations the amount of capitalization, including therein all stocks and bonds and other evidence of indebtedness, shall be such as is authorized by the Commission which, in making its determination, shall not exceed the fair value of the property involved, taking into consideration its original cost of construction, duplication cost, present condition, earning power at reasonable rates and all other relevant matters and any additional sum or sums as shall be actually paid in cash, provided, however, that the Commission may make due allowance for discount of bonds. Any reorganization agreement before it becomes effective shall be amended so that

the amount of capitalization shall conform to the amount authorized by the Commission."

- [fol. 447] It will be noted on reading the New York section above set forth that reference is made to sections 9 and 10 of the Stock Corporation law of that state in connection with reorganizations of railroad corporations. A better understanding of the New York section will be had by setting forth said sections 9 and 10 of the Stock Corporation law of that state (chapter 59, Consolidated Laws, 1909), which provide as follows:
- "Sec. 9. When the property and franchise of any domestic stock corporation shall be sold by virtue of a mortgage or deed of trust, duly executed by it, or pursuant to the judgment or decree of a court of competent jurisdiction, or by virtue of an execution issued thereon, and the purchaser, his assignee or grantee shall have acquired title to the same in the manner prescribed by law, he may associate with him any number of persons, not less than the number required by law for an incorporation for similar purposes, at least two-thirds of whom shall be citizens of the United States and one shall be a resident of this State, and they may become a corporation and take and possess the property and franchises thus sold, and which were at the time of the sale possessed by the corporation whose property shall have been so sold, upon making and acknowledging and filing in the offices where certificates of incorporation are required by law to be filed, a certificate in which they shall describe by name and reference to the law under which it was organized, the corporation whose property and franchises they have acquired, and the court by whose authority the sale had been made, with the date of the judgment or decree authorizing or directing the same, and a brief description of the property sold, and also the following particulars:
- "1. The name of the new corporation intended to be formed by the filing of such certificate; and the place where its principal office is to be located.
- "2. The maximum amount of its capital stock and the number of shares into which it is to be divided, specifying the classes thereof, whether common or preferred, and the amount of and rights pertaining to each class.

"3. The number of directors, not less nor more than the number required by law for the old corporation, who shall manage the affairs of the new corporation, and the names and postoffice addresses of the directors for the first year They may insert in such certificate any provisions relating to the new corporation, or its management, contained in any plan or agreement which may have been entered into [fol. 448] as provided in section ten of this chapter. Such corporation shall be vested with, and be entitled to exercise and enjoy, all the rights, privileges and franchises, which at the time of such sale belonged to, or were vested in the corporation last owning the property sold, or its receiver and shall be subject to all the provisions, duties and liabilities imposed by law on that corporation. Any proceedings heretofore taken in substantial compliance with this section as hereby amended, and any and all incorporations based thereon are hereby ratified and confirmed.

"Sec. 10. At or previous to the sale the purchasers thereat, or the persons for whom the purchase is to be made, may enter into a plan or agreement, for or in anticipation of the readjustment of the respective interests therein of any creditors, mortgagees and stockholders, or any of them, of the corporation owning such property and franchises at the time of sale, and for the representation of such interests in the bonds or stock of the new corporation to be formed, and may therein regulate voting by the holders of the preferred and common stock at any meeting of the stockholders, and may provide for, and regulate voting by the holders and owners of any or all of the bonds of the corporation foreclosed; or of the bonds issued or to be issued by the new corporation; and such right of voting by bondholders shall be exercised in such manner, for such period, and upon such conditions, as shall be therein de-Such plan or agreement must not be inconsistent with the laws of the State, and shall be binding upon the corporation until changed as therein provided, or as otherwise provided by law. The new corporation, when duly organized pursuant to such plan or agreement and to the provisions of law, may issue its bonds and stock in conformity with the provisions of such plan or agreement, and may at any time within six months after its organization, compromise, settle or assume the payment of any debt,

claim or liability of the former corporation upon such terms as may be lawfully approved by a majority of the agents or trustees intrusted with the carrying out of the plan or agreement of reorganization, and may establish preference in favor of any portion of its capital stock and may divide its stock into classes; but the capital stock of the new corporation shall not exceed in the aggregate the maximum amount of stock mentioned in the certificate of incorporation."

[fol. 449] Section 57 of the Public Service Commission law of this State is substantially the same as section 55 of the Public Service Commission law of New York. We find no material changes between the two sections. These two sections provide for the regulation and supervision of stocks, bonds, notes and other evidence of indebtedness to be issued by railroad corporations generally, but do not refer specifically to re-organizations. The New York Commissions at first held that the reorganization of railroads as provided for under sections 9 and 10 of said stock corporation law was subject to the jurisdiction of the Commissions of that state within the meaning of said section 55 of the Public Service Commission law. In re Adirondack Electric Power Co., 3 P. S. C., N. Y. (2nd Dist.) 242; and Re Organization of Third Avenue Railroad Co., 2 P. S. C., N. Y. (1st Dist.) 94. The last case upon appeal went to the appelate court and was there reversed. People ex rel. Third Ave. R. Co. vs. Public Serv. Com., 145 App. Div. The Public Service Commission took this case on appeal to the New York Court of Appeals, which affirmed the opinion of the appellate division, People ex rel. T. A. Ry. Co. vs. Public Serv. Com., 203 N. Y. 299. It was held by the two appellate courts that sections 9 and 10 of said stock corporation law was not under the supervision of the Public Service Commission, except to see that the stocks and bonds were issued for the proper purposes as provided in said section 55 of the Public Service Commission law. In other words, that the Public Service Commission had no jurisdiction to fix the value or to pass upon the terms of the plan and agreement, and that the provisions of the Public Service Commission law did not repeal the provisions of said sections 9 and 10 of the stock corporation law. Following these decisions, we may safely assume that

the enactment of section 55a placing the supervision of reorganizing railroad companies under the jurisdiction of the Public Service Commission of New York followed.

In the case of People ex rel. W. S. R. R. Co. vs. Public Serv. Com., 210 N. Y. 456, it is held that where no plan and agreement of reorganization is agreed upon and adopted as provided for in said sections 9 and 10 of the stock corporation law, that such new railroad corporation, even though purchasing the assets of an old insolvent corporation, comes under the supervision of said section 55 of the Public Commission law of that state. This last opinion modified and affirmed the opinion in the case of People ex rel. West Chester Street Railroad Co. vs. Public Service Commission, 158 App. Div. 251.

[fol. 450] In this State we find no provisions of the corporation laws of this State corresponding in any way to sections 9 and 10 of the Stock corporation law of the State of New York. Our attention has not been called to any section governing reorganization of railroad corporations in this State, except section 62 of the Public Service Commission law. This section seems to be the only section which governs the adoption of a plan and agreement for

reorganizing a railroad corporation.

As we understand the effect of the holdings of the several appellate courts of the State of New York in their decisions construing reorganization of railroad corporations under the provisions of sections 9 and 10 of the stock corporation law, and the provisions of the Public Service Commission law of that state, in relation to reorganizations of railroad corporations, is that public policy assures to the stockholders, bondholders, and creditors of a railroad corporation, that in case of the foreclosure of any mortgage on the property their interests will not be wiped out and that they will have an opportunity to participate in the reorganization of the road and to preserve to some extent at least their interests, and that the paramount purpose of the Public Service Commission law was for the protection and enforcement of the rights of the public.

In the case of People ex rel. Third Ave. R Co. vs. Public Serv. Com., 145 App. Div. l. c. 327-8, the court in discussing

the subject said:

"In Louisville Trust Co. vs. Louisville etc. R. Co. (174 U. S. 674) Mr. Justice Brewer, after stating that on fore-closure only the mortgagees or their respresentatives can be considered as probable purchasers, said: 'We must. therefore, recognize the fact, for it is a fact of common knowledge, that, whatever the legal rights of the parties may be, ordinarily foreclosures of railroad mortgages mean that the destruction of all interest of the mortgagor and a transfer to the mortgagee alone of the full title, but that such proceedings are carried on in the interests of all parties who have any rights in the mortgaged property, whether as mortgagee, creditor or mortgagor.'

"The foregoing citation and our own statute sufficiently establish the accepted public policy that railroad mortgages are differentiated from ordinary real estate mortgages given by a private individual. The railroads are great public enterprises subserving a useful and necessary public need. It is in the public interest that they be not destroyed [fol. 451] but continued and preserved. The vast sums of money required to construct and maintain them are obtained from numbers of people who purchase the stock and from others who purchased the bonds secured by mortgage upon property and franchises. A very large number of railroad corporations have gone through periods of reorganization. It is not to be doubted that the investments made in railroad securities have to a considerable extent been influenced by the knowledge that public policy expressed by statute and decision has assured to stockholders, bondholders and creditors that, in case of foreclosure, their interests will not be entirely wiped out but that an opportunity for reorganization is granted under the law, with the right to participate therein and to secure the preservation to some extent at least of their interests. statute, cited supra, provides that at or previous to the sale the purchasers thereat, or the persons for whom the purchase is to be made, may enter into a plan or agreement, for or in anticipation of the readjustment of the respective interests therein of any creditors, mortgagees and stockholders, or any of them, of the corporation owning such property and franchises at the time of sale, and for the representation of such interests in the bonds or stock of the new corporation to be formed, and provides that

such plan or agreement shall be written into and become a part of the certificate of the new corporation to be formed in pursuance of such plan, which plan, therefore, becomes the charter of the reorganized company. This has been the policy of the State of New York for upwards of fifty years."

It is well to note here that section 3 of the Public Service Commission law provides as follows:

"A public service commission is hereby created and established, which said public service commission shall be vested with and possessed of the powers and duties in this act specified, and also all powers necessary or proper to enable it to carry out fully and effectually all the surposes of this act."

As heretofore stated, reorganization of railroad corporations under the provisions of section 62, supra, of the Public Service Commission law of the State shall be subject to the supervision and control of the Commission and no such reorganization shall be had without the authorization of the Commission. The Missouri Legislature, in adopting said section 62, added thereto the last sentence. [fol. 452] which provides: "The Commission may by its order impose such condition or conditions as it may deem reasonable and necessary." It is to be noted that under the terms of section 10 of said stock corporation law, it is specifically provided: "Such plan or agreement must not be inconsistent with the laws of this state." We have no hesitancy in holding that under the powers of this Commission governing reorganizations as set forth in said section 62, supra, it would not be warranted in approving or giving its assent to any plan and agreement which contained any provision in violation of the Constitution or any of the statutes of this State.

We think, giving this statute a fair and reasonable construction, that this Commission has the jurisdiction and authority not only to determine the amount of capitalization and the fair value of the property included in the reorganization, but to determine whether the plan and agreement of such proposed reorganization is against public policy, as hereinbefore stated, and if so found to be, the Commission would be fully warranted in refusing to lend

its approval to any such plan and agreement of reorganiza-

#### III

## Plan and Agreement of Reorganization

While the plan and agreement of reorganization as submitted is quite voluminous, containing some forty-nine pages of printed matter, we deem it unnecessary to set the same out at length. We think it sufficient to state the material points of the plan and those which are opposed or contested by the various interveners and protestants.

The properties and franchises of the St. Louis & San Francisco Railroad Company (hereinafter called the Railroad Company) have been in the hands of receivers appointed by the United States District Court at St. Louis since May 27, 1913. That company was organized under the laws of this State in 1896, taking over the properties of the former St. Louis & San Francisco Railway Company at that date.

The lines of railroad of the Railroad Company and of its leased and auxiliary companies, all of the capital stock of which it owns, which are to be embraced in the reorganized system contemplated by the plan, including the line of railroad of Quanah, Acme & Pacific Railway Company, extend in general from St. Louis and Kansas City, Missouri, to Ellsworth, Kansas; Waynoka, Oklahoma; Oklahoma City, [fol. 453] Oklahoma; Quanah and Vernon, Texas; Dallas Fort Worth and Menard, Texas, and Memphis, Tennessee, and Birmingham, Alabama, and comprise about 5,154.71 miles of first main track in the following states: Alabama, 132.49 miles; Arkansas, 597.50 miles; Kansas, 629.97 miles; Missouri, 1,713.72 miles; Mississippi, 142.86 miles; Oklahoma, 1,497.56 miles; Tennessee, 18.34 miles and Texas, 422.27 miles.

The Railroad Company also operates 203.46 miles of main line trackage rights in the following states: Missouri, 6.18 miles; Oklahoma, 23.26 miles, and Texas 174.02 miles.

On May 1, 1913, default was made in the payment of the interest then falling due on the \$69,284,000 of the Railroad Company's general lien 5 per cent gold bonds, and on July 1, 1914, default was made in the payment of the interest

which fell due on that date on the \$68,557,000 of refund. ing mortgage bonds. No interest has been paid on either issue since those defaults, and proceedings have been instituted for the foreclosure of the mortgages securing the two issues. Defaults have also been made in the payment of the principal and interest of the Railroad Company's \$2,250,000 two-year 5 per cent secured gold notes, and \$2,600,000 two-year 6 per cent secured gold notes, and in payment of interest on the Railroad Company's \$28,582. 000 of New Orleans, Texas & Mexico Division first mortgage bonds, \$12,153,750 of trust certificates for preferred stock of Chicago & Eastern Illinois Railroad Company, and \$16. 944,500 of trust certificates for common stock of Chicago & Eastern Illinois Railroad Company, and on the guaranty by the Railroad Company of the interest payable on \$14. 000,006 of New Orleans Terminal Company first mortgage 4 per cent bonds.

It is alleged by petitioners, and sustained by substantial proof, that the difficulties of the Railroad Company were in a large measure due to the failure of the Chicago & Eastern Illinois and New Orleans, Texas & Memphis systems to earn the fixed charges which the Railroad Company had assumed in connection with its acquisition of the interest therein and it is not intended under the plan that the lines of those systems or the property of the New Orleans Terminal Company (which is operated in connection with the New Orleans, Texas & Mexico system) shall be

included in the reorganization.

It is alleged in the petition and supported by proof that immediately following the receivership in 1913, a committee was organized to represent holders of refunding mortgage [fol. 454] bonds and the deposit of said bonds was subsequently called for under the terms of an agreement dated June 20, 1914; Speyer & Company immediately following said receivership called for the deposit of the general lien 15-20 year gold bonds under a bondholders' agreement dated May 28, 1913. A committee of defense has also been formed by Office National des Valeurs Mobilieres, Paris, to represent French holders of general lien 15-20 year gold bonds, French series, and a large number of said holders have designated L. C. Krauthoff, Esq., as their attorney in fact. That these representatives of bondholders have for a long time been engaged in an examination of the affairs

of the Railroad Company's system, and the relative value and earning capacity of its various lines, with a view to formulating a plan of reorganization which would fairly recognize the rights of the security holders. and attention have been devoted to acquired knowledge as to details, and a careful expert examination of the Railroad Company's operations and physical condition and of its financial requirements has been made by Mr. J. W. Kendrick, an expert of great experience in that line. The plan for the reorganization of the system which is submitted has been formulated as a result of such examination, and it is expected will accomplish, among other things, the following results: (1) Reduction of the fixed charges to a limit believed to be safely within the net earning capacity of the reorganized property; (2) adequate capital provision for present and future requirements; (3) payment or adjustment of all debts, guaranties, etc., and provision for existing equipment trust obligations; and (4) the preservation of the parts of the system deemed advantageous, and such control for the reorganized property as shall safeguard the rights of security holders.

The plan has been adopted by said committee representing refunding mortgage bonds, by Speyer & Company, representing general lien bonds deposited under the agreement of May 28, 1913, and by L. C. Krauthoff, representing the committee of defense and as attorney in fact for French

holders of general lien bonds.

It is stated that committees representing the holders of the following securities have approved the provisions of the plan with reference to the treatment of such securities: New Orleans, Texas & Mexico Division first mortgage gold bonds, two-year five per cent secured gold notes, two-year six per cent secured gold notes; St. Louis & San Francisco Railroad Company trust certificates for preferred and comfol. 455 mon stock of Chicago & Eastern Illinois Railroad Company, and Ozark & Cherokee Central Railroad Company first mortgage five per cent gold bonds.

The plan has also been approved by the committee representing stockholders of the Railroad Company under an

agreement dated December 1, 1913.

The proof shows that the Railroad Company owns the entire capital stock of the Kansas City, Fort Scott & Memphis Railway Company and operates the lines of the rail-

road of that company under a lease for ninety-nine years from August 23, 1901. These lines constitute 919.45 miles of first main track, running in general from Kansas City to Memphis, with mileage in the states of Missouri, Ar-

kansas, Kansas, Oklahoma and Tennessee.

The Railroad Company also operates under a lease running for ninety-nine years from December 17, 1903, the lines of railroad of Kansas City, Memphis & Birmingham Railroad Company, the entire capital stock of which is owned by Kansas City, Fort Scott & Memphis Railway Company. These lines include 290.4 miles of first main track running in general from Memphis to Birmingham and Bessemer, in the states of Alabama, Mississippi and Tennessee.

The Railroad Company also owns the entire capital stock of the Birmingham Belt Railroad Company, which operates a belt and terminal system in the city of Birmingham, consisting of about fourteen acres of well-located real estate and 39.1 miles of track serving thirty-four industries.

The Railroad Company also owns the entire capital stock of Kansas City & Memphis Railway & Bridge Company, which owns the bridge over the Mississippi river near

Memphis.

The Railroad Company also owns the entire capital stock of the following companies which operates lines of railroad in Texas: Fort Worth & Rio Grande Railway Company, 223.44 miles; Brownwood North & South Railway Company, 17.65 miles; St. Louis, San Francisco & Texas Railway Company, 85.32 miles, and Paris & Great Northern Railway Company, 16.94 miles.

The Railroad Company also owns or has interest in valuable terminals and terminal facilities at St. Louis, Kansas City, Wichita, Memphis, Birmingham, Dallas and other

terminal points on the lines of the system.

The plan of reorganization contemplates that all of the lines of railroads and interests hereinbefore described, ex-[fol. 456] cept the Chicago & Eastern Illinois Railroad Company, New Orleans, Texas & Mexico system and New Orleans Terminal Company, shall be included in the reorganized system, either by direct ownership or by ownership through securities or by the continuance of existing leases and their transfer to the new company contemplated by the plan, the bonds of the Kansas City, Fort Scott & Mem-

phis system, however, to remain undisturbed.

The Railroad Company also owns \$6,777,800 of common stock and \$8,102,500 of preferred stock of Chicago & Eastern Illinois Railroad Company, for which the Railroad Company issued its stock trust certificates to the amount of \$12,153,750 for preferred stock and \$16,944,500 for common stock, these certificates bearing guaranteed dividends at the rate of four per cent per annum.

The Railroad Company also owns the entire capital stock of New Orleans, Texas & Mexico Railroad Company, and has issued \$28,128,000 of its New Orleans, Texas & Mexico Division first mortgage gold bonds, secured by a first mortgage on the property of the latter company. In July, 1913, the New Orleans, Texas & Mexico lines were placed in the hands of separate receivers. They have been operated independently of the Railroad Company's system since that date, and are now in the process of a separate reorganization.

As hereinbefore stated, it is not intended under the terms of the present plan and agreement of reorganization that the lines of Chicago & Eastern Illinois Railroad Company or those of New Orleans, Texas & Mexico Railroad Company or the property of New Orleans Terminal Company shall be taken over in any manner by the New Company on the reorganization.

Further details of the plan or reorganization, the old securities outstanding and the proposed new securities to be issued, the exchange of the new securities for the old securities, the reduction of fixed capital charged and various other phases of the plan may be summarized as follows:

### Capitalization and Fixed Annual Interest Charge or Guarantee

The total capitalization and fixed annual interest charge or guarantee of the present St. Louis & San Francisco Railroad Company, as of June 30, 1915, is shown in the petition of applicants as follows:

[fol. 457] "Printed, supra, in full, in application to Missouri Public Service Commission."

New Securities Proposed to be Authorized and Issued by the New Company

Under the plan and agreement, the New Company proposes to have authorized and to issue or have reserved for issue the following new securities as stated in their petition:

"Printed supra, in full, in application to Missouri Public Service Commission."

How New Proposed Securities are to be Distributed

The new securities as proposed to be issued by the New Company under the plan and agreement are to be disposed of as follows:

"Printed, supra, in full, in application of Missouri Public Service Commission."

How New Cash to the Amount of \$25,000,000 is Proposed to be Expended

The plan and agreement proposes to raise the sum of \$25,000,000, which it is estimated will be necessary in connection with carrying out the plan and agreement and which is proposed to be expended as follows:

"Printed supra, in full, in application to Missouri Public Service Commission."

Fixed and Contingent Charge Obligations of the New Company

The fixed and contingent charge obligations of the New Company as shown by the plan and agreement and stated in the petition are as follows:

"Printed, supra, in full in Reorganization Plan and Agreement, and in application to Missouri Public Service Commission." Fixed Charges under the Old Securities Compared with the Fixed Charges under the Proposed New Securities

[fol. 458] Upon the issue of the proposed new securities as hereinbefore stated, the capitalization and interest charges of the New Company are compared with the capitalization and interest charges of the Railroad Company, as follows:

"Printed, supra, in full, in application to Missouri Public Service Commission."

Reductions in Capitalization and Fixed Charges

It is alleged by petitioners that the plan of reorganization is designed and intended to effect a reduction of the capitalization to an amount well within the value of the property, and such a decrease in the annual fixed interest charges as will be well within the earning capacity of the New Company. The contraction of bonded indebtedness bearing a fixed interest is accomplished by the provisions of the plan that holders of the present refunding mortgage bonds shall accept for approximately twenty-five per cent of their present bonds, and holders of the present general lien bonds shall accept for approximately seventy-five per cent of their present bonds, adjustment and income bonds upon which interest is payable only out of income. It is contended by petitioners that the tables as hereinbefore set forth show that the following reductions will be accomplished by the reorganization.

"Printed, supra, in full, in application to Missouri Public Service Commission."

Income Account for Four Years Ended June 30, 1915

The petition contains a statement showing the income account for the year ended June 30, 1912, \$12,199,971.44; for the year ended June 30, 1913, \$14,220,029.40; for the year ended June 30, 1914, \$10,210,028.08; for the year ended June 30, 1915, \$11,641,682.63; or an average for the four years ended June 30, 1915, \$12,067,927.88; added thereto for esti-

mated net earnings of Quanah, Acme & Pacific Railway, \$75,000.00; or \$12,142,927.88.

### IV

# Fair Value of Property

[2] Determination by the Commission of the fair value of the property involved in a reorganization of a railroad under section 62 of the Public Service Commission law requires that the Commission take into consideration; (1) the original cost of construction, (2) duplication cost, (3) pres-[fol. 459] ent condition, (4) earning power at reasonable rates, (5) all other relevant matters, (6) any additional sum or sums as shall be actually paid in cash, and (7) the Commission may make due allowance for discount on bonds. On consideration of said section 62, it is apparent that the determination of fair value for the purpose of limiting the securities to be issued on reorganization of a railroad company is a different question from determining present value in a rate case, in at least one respect, that the "earning power at reasonable rates" is to be taken into considera-There may also be property not used tion in the former. and useful for railroad purposes, which might properly be included in determination of value of property in a reorganization, and excluded in a valuation for rate making.

# (1) Original cost:

The only evidence before us as to original cost is that presented by applicants' witness, Mr. Alexander Douglas, chief accountant of the receivers of the St. Louis & San Francisco Railroad, who testified that the "book value" of the properties involved in this reorganization located in the states of Missouri, Oklahoma, Kansas and Arkansas, and in the state of Texas north of the Red river, was the sum of \$305,935,958. No details or analysis of original cost of these properties were presented, and we are consequently unable to examine into the "book value" in detail, even if that were possible without having a complete audit by the Commission's accounting force, which would involve much time and a large expenditure of money, but we are aware, and the witness so testified, that since about 1907 the accounts have been required by law to be kept in conformity with

the accounting rules of the Interstate Commerce Commission, which, in the absence of allegations to the contrary, leaves little doubt that additions and betterments in the past eight years have been properly charged.

The evidence before us is to the effect that the original cost of the railroad property involved in this reorganization

is in round numbers \$306,000,000.

# (2) Duplication cost:

It appears from the evidence in this case that the cost of reproduction new of "road" and "equipment" to be aconired by the New Company under this proposed reorganization is the sum of \$319,276,000, of which \$54,662,552 is for equipment, as testified by applicants' witness, Mr. F. G. Jonah, chief engineer of the receivers of the St. Louis & San [fol. 460] Francisco Railroad. His valuation appears to be based upon a detailed valuation of approximately half of the track mileage, on which basis, by comparison, the remaining track mileage was estimated, together with a detailed valuation of equipment and terminals. Including terminals and equipment, his valuation amounts to about \$62,000 per mile of line for the 5,166.24 miles involved. This witness recently testified in more detail in case No. 505, "Application of James W. Lusk et al., receivers of the St. Louis & San Francisco Railroad Company, for increases in passenger, baggage and freight rates," as to the value in Missouri, including terminals, which was placed at \$68,527 per roadway mile, by using detailed estimates made in Arkansas, Kansas and Oklahoma, showing in Arkansas \$47,000 per mile and in Oklahoma \$42,000 per mile, the value of the terminals at St. Louis, Kansas City and Springfield in this State being estimated at \$27,591,026.

The Commission has not undertaken the valuation of the property under section 60 of the Public Service Commission law, nor ordered its engineers to make estimates of the cost of reproduction, on account of the time and the large expense involved, and the Commission having no appropriation to cover same, and for the further reason that the railroads of the United States are being valued under the direction of the Interstate Commerce Commission, so there is not before us a complete detailed estimate of the cost of reproduction of the property, but a more general estimate based in part on detailed inventories and appraisals. It

appears sufficient to state that the evidence before us is to the effect that it would cost \$319,300,000 to reproduce the property new, including the estimate of the land. Further, there is some property owned, but not used for railroad purposes, which, from the evidence, amounts to at least \$2,500,000, and which should be added, making a total of \$321,800,000.

### (3) Present condition:

Applicants allege as to the present condition that, "as a result of the improvements already made, the condition and earning capacity of the property has been notably advanced and now compares favorably with the physical condition of neighboring lines," stating, "The plans which have been made for the betterment and improvement of the property have already been pointed out. The receivers have been following these plans so far as possible since their appointment and advise that they have made large expenditures on [fol. 461] account of maintenance of way and maintenance of equipment in order to improve the property generally.

\* \* The amount charged to operating expenses for maintenance of way and equipment during the period of receivership compares with previous years as follows:

Yearly average for two years ending June 30, 1913 (prior to receivership) \$11,242,000 Yearly average for two years ending June 30, 1915 (during receivership) 14,252,000

"The receivers advise that during the years 1913 and 1915 there had been expended in the redemption of equipment, trust obligations and for improvements and additions to property the sum of \$8,155,939.24, which has not been taken into the capital account."

We are aware from our own inspection and reports thereon, that considerable expenditures have been made to improve the conditions of the property in the last two years, and that the property in Missouri generally, with some possible exceptions, is in good condition. Further, this road has considerable of its main line mileage in Missouri protected by block signals.

# (4) Earning power at reasonable rate:

The average net earnings for the last four fiscal years approximate \$12,142,000 a year. Considering that the operating expenses have been somewhat higher in the past two years, on account of increased expenses for maintenance of way and equipment, and considering also that the properties not included in the reorganization, namely, the Chicago & Eastern Illinois and the New Orleans, Texas & Mexico properties in 1914 had operation ratios, that is, ratio of operating expenses to gross operating income of 84 per cent and 93 per cent, respectively, whereas, the "Frisco" proper, exclusive of the two roads named, had in 1914 an operating ratio of 75 per cent and in 1915 an operating ratio of 69 per cent, we conclude that the normal net earnings at this time could reasonably be taken at \$14,000,000 a year.

Mr. J. W. Kendrick, an engineer, who made a comprehensive report on the system, made estimates of future net earnings increasing from approximately \$13,000,000 in 1915 to approximately \$19,500,000 in 1923. His estimate for the vear ending June 30, 1916, was \$13,400,000 net operating income, to which should be added approximately threequarters of a million of miscellaneous income, making a total of a little over \$14,000,000 for this year. Possibly, the [fol. 462] estimates of Mr. Kendrick should be deferred a year, owing to the conditions resultant upon the present European war; altogether, however, it does not appear unreasonable to assume the total net earnings at \$14,000,000 a year at this time. There appears some uncertainty from the evidence as to whether net earnings should be capitalized at 41/4, 41/2 or 5 per cent. The result of capitalizing \$14,000,000 net earnings at each of the percentages named is in round numbers as follows: \$14,000,000 capitalized at 41/4 per cent would give a total capitalization of \$327,000,-000; at 41/2 per cent, \$311,000,000, and at 5 per cent, \$280,-000,000.

### (5) Other revelant matters:

[3] It appears that the outstanding stock of the St. Louis & San Francisco Railroad Company, which is in the hands of receivers, is \$50,000,000, and that the par value of its bonds, notes and other evidences of indebtedness out-

standing is \$306,890,056, making the total sum of \$356. 890,056. In the total indebteness, as above stated, are in. cluded the \$28,128,000 of bonds issued jointly by the New Orleans, Texas & Mexico system and the St. Louis & San Francisco Railroad Company, on which the latter company is jointly obligated for the full payment of the bonds and interest. The Railroad Company also guaranteed one-half of the payment of \$14,000,000 of New Orleans Terminal mortgage bonds. It also issued and has outstanding \$26. 598,250 of trust certificates issued in payment for Chicago & Eastern Illinois preferred and common stock. The total of the last three above-named obligations of the Old Company aggregate \$61,726,250. Under the plan of reorganization, all of these obligations are eliminated. Counsel for some of the protestants contend that these last three named obligations of the Old Company, aggregating \$61,726,250. are not capital obligations.

The term "capitalization" as used in section 62 of the Public Service Commission law is therein defined to include "all stocks and bonds and other evidence of in-

debtedness."

We think that the obligations of the Old Company to the New Orleans, Texas & Mexico bonds, the New Orleans Terminal mortgage bonds, and its outstanding trust certificates, issued in payment for Chicago & Eastern Illinois preferred and common stock, are capital obligations within the meaning of said section 62. The plan, as hereinbefore stated, contemplates a reduction in capitalization of \$29,678,868, or [fol. 463] 8.31 per cent of the entire capital obligations of the Old Company, making a reduction in the total annual fixed charges (including K. C., Ft. S. & M. system bonds undisturbed) of \$5,728,135, or a reduction of 38.47 per cent; and a reduction in the total annual charges fixed and contingent (including K. C., Ft. S. & M. system bonds undisturbed) of \$1,362,205, or 9.15 per cent.

[4] It appears that no estimate was made, or at any rate presented to us, of intangible value in connection with the appreciation of costs or estimates of cost to aid us in arriving at the value of the property as a going corcern. Though the finances of this company may not have been working successfully, yet we believe we should take into account the fact that the property is being successfully operated with an efficient working organization, and also that it has need

of working capital, which latter is expected to be provided from the new money put in.

# (6) Due allowance for discount on bonds:

We are not asked by applicants to make due allowance for discount on bonds in this case, as applicants allege that the proposed bonds, stocks, and other evidence of indebtedness do not exceed the fair value of the property and new money, arguing that the fair value of the property is the cost of duplication, \$319,376,000, plus \$2,500,000 for other property and that the cash to be acquired is \$4,500,000 from the receivers, and \$6,800,000 from the stockholders in connection with the sale of \$25,000,000 of prior lien mortgage bonds; that is, a total of \$333,000,000 property and cash against a proposed issue of securities aggregating \$327,-211,188. We think that due allowance for discount on bonds should be considered along with all the other elements of value we are required to consider under section 62, supra.

# (7) Fair value:

The duties of the Commission under the provisions of the Public Service Commission law and other statutes of the State relating to capitalization, reorganizations and mergers of railroad corporations is not merely restrictive, but should also be constructive. The Commission's powers of revision or restriction with those relating to approval or disapproval enable it in many cases, by advice as well as rulings, to bring about an effective reorganization upon bases fair, alike to the epublic, the companies as corporations and [fol. 464] the holders of securities involved. stitutes a valuable function of the government which should be exercised when and to the extent it may be practicable. The primary object of section 62 of the Public Service Commission law of this State appears to have been enacted substantially in form, first in the State of New York, and the object of the amendment of the New York statute by adding thereto section 55a, supra, was to place the supervision of the issuance of stocks, bonds, notes and other evidence of indebtedness of the reorganization of railroad corporations under the supervision and jurisdiction of the Public Service Commission, and to prevent the over issuance of stocks and bonds by limiting them on reorganization instead of allowing them to exceed the amount theretofore issued by the reorganized corporation. We find that the appellate courts of New York in construing the statutes governing the reorganization of railroad corporations have taken rather a broad and equitable view as to the amount of capitalization to be issued in such reorganizations. The rule seems to have been established by the courts that the amount of new securities generally should not exceed those issued and outstanding by the reorganized company. In the case of People ex rel. T. A. Ry. Co. v. Pub. Serv. Com., 203 N. Y. L. c. 310-312, the court, in discussing a reorganization of a street railway company, said:

"The requirement of the statute is that the issue of the securities shall be necessary for the acquisition of the property, and although as a general rule under this requirement the securities should not be authorized except where the value of the property is equal to the amount of the securities issued, there may be exceptions to that rule. One is found in the statute itself. In the case of the merger or consolidation of two or more corporations it is provided that the capital stock of the corporation formed by the merger shall not exceed the capital stock of the corporations consolidated and any additional sum paid in in cash. Thus, in the case of merger the limit of the amount of stock of a corporation is dependent, not on the value of its property, but on the stock outstanding of the constituent corporations prior to the merger. We think the same rule is applicable to the case of a corporation formed on the reorganiaztion of a forcelosed railroad.

"It is not necessary to consider the issuance of the securities of the new corporation as a refunding of the outstanding obligations of the old. It is sufficient to say that the statute authorizes the bondholders, stockholders and cred-[fol. 465] itors to agree upon a plan for the readjustment of their respective interests and authorizes the new corporation to issue its stock and bonds in accordance with the agreement. A readjustment of the interests of the parties does not contemplate that the new securities shall necessarily be scaled down to the actual value of the property. If this was the contemplation of the statute, the statute would be of little value. The property sold rarely realizes the amount due on the mortgage foreclosed. If the sale

price is considered the criterion of value there could be no plan which would give the holders of stock or of junior securities any interest in the new corporation, while often the bondholders under the mortgage foreclesed might find themselves without the right to obtain any securities of the new corporation in lieu of their bonds. The intent of the statute was to enable the various persons interested in an insolvent or defaulted railroad to agree upon some plan or scheme to take the road out of insolvency and a receivership and make the enterprise a going concern. For this purpose additional money is generally requisite which, as already said, can be obtained only from those interested in the property. and not even from them unless, as an inducement to advance the money, they are given the opportunity of retrieving their prior investment. In many instances the growth of the community in which the railroad was located and the improvement in business conditions has ultimately instified the advance of new capital, and the benefit and protection of the original investors in the enterprise was also the object of the statute. We do not say that in the reorganization of a railroad the new corporation is authorized to issue securities in excess of those of the company to whose property and franchises it has succeeded and the new money that may be put in the enterprise. Such a plan would be plainly inconsistent with the spirit of the Public Service Commissions law against the issue of 'watered' stock or bonds, but, up to the limit we have named, the new corporation has the right to issue securities."

[6] Counsel for some pretestants suggested at the hearing and in brief that this Commission would be bound in a rate hearing as to the amounts of capitalization allowed in this reorganization. As heretofore stated, it would be impracticable for this Commission at this time to attempt to make a detailed physical valuation of the properties involved, such as the Interstate Commerce Commission is now making of all the interstate railroads of the United States. It would take from one to two years to make such [fol. 466] a valuation and the expenditure of a large amount of money. This Commission desires to state that in no case has it ever considered that it was bound by the amount of capitalization issued by any public utility in a rate controversy. The decision of the United States Supreme Court,

in the familiar case of Smyth v. Ames, held that the market value of the stocks and bonds should be considered as one element in determining fair value. In a rate hearing before this Commission, it would endeavor to ascertain the fair present value of the properties of the reorganized company located within this State and would fix rates thereon, considering capitalization only as one element in reaching that value. It is well known that the assets of a corporation may greatly increase above the capitalization or may greatly decrease below the capitalization, depending upon many conditions of the markets, inventions, discoveries and operating conditions. This statement is made relative to capitalization in rate cases in order that there may be no misunderstanding as to the Commission's position hereafter in any rate hearing.

After giving careful consideration to all the evidence before the Commission, and considering all of the methods of arriving at value as we are required to do under the provisions of said section 62, supra, and also all the elements of value, and considering the railroad in operation, we find that the fair value of all of the property involved in this case, taking a broad and equitable view of the provisions of said section 62, supra, as applied to reorganization of railroad corporations, including all other property involved not useful for railroad purposes, and together with the sums to be paid in cash as provided for under the plan, having due regard for discount on bonds, to warrant the issuance of capitalization to the amount of \$319,379,420, under the modifications and conditions of the plan and agreement as herein provided.

#### V

### Claims of Non-secured Creditors

[7] Honorable Louis Houck and certain other persons appear herein as non-secured creditors, whose claims are not yet established and liquidated, although pending in the courts. Their claims are predicated upon a guarantee of the bonds of the Cape Girardeau & Northern Railway Company by the St. Louis & San Francisco Railroad Company. The validity of the guarantee is disputed by the receivers and the Railroad Company. The amount of the claims is [fol. 467] approximately \$1,500,000. Objected to the pro-

posed plan and agreement of reorganization by these nonsecured creditors is predicated on the sole proposition that no provision is made therein for the payment of non-secured claims. The plan as heretofore set forth contains certain provisions relating to the settlement of non-secured creditors. With the view we take of the law of the case, it is unnecessary for us to set out in detail and discuss the adequacy of the provisions made in the plan for the payment of the non-secured creditors.

According to the proof offered by petitioners in this case, the total value of all the assets of the Old Company now being reorganized and to be transferred to the New Company will aggregate about \$333,000,000. Having offered proof of such value for capitalization purposes, under section 62, supra, we do not think the New Company can be heard to deny such value when it comes to paying all the honest non-secured creditors of every kind and character. including all claims for overcharges duly established, of the Old Company. This Commission does not look with favor upon any plan of reorganization which seeks to defeat the payment of the honest obligations of the Old Company on fair and equitable terms.

As above stated, the proof in this case shows that there is a large equitable value in the stock of the Old Company which is proposed to be reserved as a stock interest in the New Company for the old shareholders, which will still leave the property of the New Company subject to the claims of non-assenting creditors of the Old Company as announced by the Supreme Court of the United States in the case of Northern Pacific Rv. Co. v. Boyd, 228 U. S. 482. In that

case the court holds (1, c, 502):

"Corporations, insolvent or financially embarrassed, often find it necessary to scale their debts and readjust stock issues with an agreement to conduct the same business with the same property under a reorganization. may be done in pursuance of a private contract between bondholders and stockholders. And though the corporate property is thereby transferred to a new company having the same shareholders, the transaction would be binding between the parties. But, of course, such a transfer by stockholders from themselves to themselves cannot defeat the claim of non-assenting creditor. As against him the

sale is void in equity regardless of the motive with which [fol. 468] it was made. For if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt the subordinate interest of the old stockholders would still be subject to his claim in the hand of the reorganized company. Cf. San Francisco & N. P. R. R. v. Bee, 48 California, 398; Grenell v. Detroit Gas Co., 112 Michigan 70. There is no difference in principle if the contract of reorganization, instead of being effectuated by private sale, is consummated by a master's deed under a consent decree."

Again in the same case the court further discusses the rights of non-secured creditors in relation to those of stockholders of the Old Company, l. c. 504:

"And while the agreement contains no provision as to the payment of unsecured creditors, yet the Railway Company purchased insecured claims aggregating \$14,000,000. Whether they were acquired because of their value to avoid litigation, or in recognition of the fact that such claims were superior to the rights of stockholders, does not appear nor is it material. For if purposely or intentionally a single creditor was not paid or provided for in the reorganization. he could assert his superior rights against the subordinate interests of the old stockholders in the property transferred to the new company. They were in the position of insolvent debtors who could not reserve an interest as against creditors, their original contribution to the capital stock was subject to the payment of debts. The property was a trust fund charged primarily with the payment of corporate liabilities. Any device whether by private contract or judicial sale under consent decree whereby stockholders were preferred before the creditor was invalid. Being bound for the debts, the purchase of their property by their new company for their benefit put the stockholders in the position of a mortgagor buying at his own sale."

The court, further discussing the rights of non-assenting non-secured creditors to accept provisions if offered under the plan (l. c. 508), said:

"The fact that at the sale, where there was no competition, the property was bid in at \$61,000,000 does not disprove the truth of that recital, and the shareholders cannot now be heard to claim that this material statement was untrue and that as a fact there was no equity out of which [fol. 469] unsecured creditors could have been paid, although there was a value which authorized the issuance of \$144,000,000 fully paid stock. If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event, it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever.

"This conclusion does not, as claimed, require the impossible and make it necessary to pay an unsecured creditor in cash as a condition of stockholders retaining an interest in the reorganized company. His interest can be preserved by the issuance, on equitable terms, of income bonds or preferred stock. If he declines a fair offer he is left to protect himself as any other creditor of a judgment debtor, and, having refused to come into a just reorganization, could not thereafter be heard in a court of equity to attack it. If, however, no such tender was made and kept good he retains the right to subject the interest of the old stockholders in the property to the payment of his debt. their interest is valueless, he gets nothing. If it be valuable, he merely subjects that which the law had originally and continuously made liable for the payment of corporate liabilities."

Bearing in mind that the court held in the Boyd case, supra, that the plan and agreement entered into between the bondholders, stockholders and creditors for a reorganization of a railroad corporation is a private agreement between such parties, the terms of which may be refused by any non-assenting creditor, and that the establishment of the amount of any disputed creditor's claim is a judicial question for determination by a court of competent jurisdiction, and that any value in the assets of the Old Company which is being transferred to the New Company for the old stockholders is subject to the payment of all non-secured creditors, as declared in the Boyd case, supra, we think the rights of all non-secured creditors in this reorganization are fully protected under the law as above

stated, and which rights are not for determination by this

Commission in a reorganization proceeding.

What we have said with reference to the non-secured creditors represented by Mr. Houck and others applies with equal force to the claim of the Citizens Bank of Union, which is the legal holder and owner of \$5,000 of the St. Louis & San Francisco Railroad Company's two-year six per cent [fol. 470] collaterally secured gold notes of the issue of \$2,600,000, and represented by Joseph T. Davis, Esq., in this proceeding.

### VI

### Objection of Stockholders

Construing the first sentence of section 62 of the Public Service Commission law, providing that reorganizations of railroad companies "shall be subject to the supervision and control of the Commission," as making it our duty to see that the plan of reorganization submitted is not in conflict with the Constitution, laws or public policy of this State, and thus limiting the scope of our authority, two serious objections to the plan are interposed by the protesting stockholders, to-wit: That the provision giving to holders of five per cent income bonds the option to exchange such bonds for an equal par value of six per cent preferred stock, and the provision for the management and control of the new corporation for a period of five years by what is termed a voting trust" are inconsistent with the Constitution and laws of this State, and therefore that the plan to that extent should be disapproved. In the discussion of the objections to the plan much is said in the briefs as to its injustice and inequity to the common stockholders in the two particulars stated. But regarding our jurisdiction, limited as above defined, we consider such matters as within the domain of the private rights of the parties interested. and shall confine our inquiry to the objections made in so far only as the rights of the public are concerned under the Constitution, statutes and public policy of this State.

If the plan of reorganization should be approved by this Commission, it does not clearly appear how it shall be made binding upon and appear in the organization of the New Company. As previously stated, our reorganization statute, section 62, supra, was taken from the laws of New

York, and sections 9 and 10 of the stock corporation law of that state, heretofore set out, provide in detail for the reorganization of corporations and for a plan and agreement, fixing the rights of the parties interested, as is sought to be done by the plan and agreement now before us. It is provided in said section 9 that a certificate shall be filed by the parties to the reorganization with the proper state officers setting forth, among other things:

"The maximum amount of its capital stock and the number of shares into which it is to be divided, specifying the [fol. 471] classes thereof, whether common or preferred, and the amount of and right pertaining to each class."

#### And that

"They may insert in such certificate any provisions relating to the new corporation, or its management, contained in any plan or agreement which may have been entered into as provided in section ten of this chapter."

Section 10 prescribes the scope of the plan and agreement for the reorganization and the terms and conditions thereof and contains this language:

"Such plan or agreement must not be inconsistent with the laws of the state, and shall be binding upon the corporation until changed as therein provided, or as otherwise provided by law."

The plan and agreement thus becomes a part of the charter of the New Company and binding upon it accordingly. We have no reorganization law in this State corresponding to said sections 9 and 10 of the New York law. Section 62, supra, of our law recognizes that the reorganization plan and agreement may become effective, and we think such plan should be regarded as a part of the articles of association or charter of the proposed New Company, in order to make it binding upon the company and all of the parties who are or may become interested therein.

### (1) Convertibility of income bonds:

(8) By the terms of the plan, income mortgage gold bonds not to exceed the total sum of \$75,000,000, at any one time outstanding, are to be issued by the New Company, se-

cured by mortgage on the properties covered by (and subject to) the prior lien mortgage and the adjustment mortgage. The dates, amounts and purposes of the several issues of said bonds are set forth as follows:

"To be issued in partial exchange for existing securities embraced in the plan and for adjustment of outstanding indebtedness; bonds not used or required to be reserved for that purpose to be available for corporate purposes of the New Company.

"Reserved for issue at par after July 1, 1921 at the cumulative rate of \$2,000,000 annually for improvements, betterments and additions

and equipment

[fol. 472] "Reserved for issue at par after July 1, 1931, at the cumulative rate of \$3,000,-000 annually for improvements, betterments and additions and for equipment

\$38,661,200

20,000,000

16,338,800

\$75,000,000

It is also provided in the plan that these bonds "may be made convertible at the option of the holder into preferred stock, (or, if converted during the life of the voting trust, into trust certificates therefor,)"

It thus appears that a portion of these bonds are to be issued presently upon the organization of the New Company and the remainder at later dates, and that all may be made convertible into preferred stock at the option of the holder, and without the consent of the stockholder. And it is shown by the testimony that this option if exercised by the holders of income bonds would result in an increased annual charge against earnings of \$385,000, by reason of the dividend on the preferred stock being one per cent higher than the interest on the bonds. The effect of this added charge is to postpone the right of common stockholders to participate in dividends to the extent of said increase. The plan also provides for future issues of common and preferred stock.

Section 10 of Article XII of the Constitution of this State is as follows:

"No corporation shall issue preferred stock without the consent of all the stockholders."

Section 3065, R. S. Mo. 1909, governing the issue of preferred stock by railroad corporations, provides that:

"Any railroad company organized under the laws of this state may issue a preferred stock for such amount and mon such terms and conditions as the board of directors may prescribe. But before any issue of such preferred stock shall be made, the question of issuing the same, together with the terms, conditions and privileges upon which the same is proposed to be issued, shall be submitted to a vote of the stockholders of said company, at a regular annual election for the directors thereof, or at a special meeting of the stockholders of said company called to consider the same, if at such election all the stockholders shall con-Said preferred stock shall be offered to all the common stockholders pro rata in proportion to the [fol. 473] amount of common stock held by them. If any common stockholder shall fail to take such preferred stock after thirty days' notice by publication in two daily newspapers in St. Louis, and written notice to clerks of counties holding stock, then any other person may buy said stock."

The plan of reorganization contemplates the incorporation of a New Company under the general corporation laws of this State, and it is well recognized law that where a corporation is thus organized the provisions of the Constitution and statutes applicable thereto enter into and become a part of the charter of the corporation. In 1 Thompson, supra, Sec. 172, discussing this subject, it is said:

"And the organization of a corporation under the general laws is an acceptance of the provisions of such laws as a part of the charter of the corporation. In other words, the articles of association or incorporation, taken in connection with the general law under which the corporation has been organized, from what is sometimes termed the 'constitution' of the corporation. These answer the same purpose as the special charter. Articles of association on the one hand may be said to constitute the contract of association between the stockholders, at the same time defining the character and extent of the business in which the corporation shall engage, while on the other hand the general laws constitute the grant from the state to those organizing the corporation, of the franchise or right of or-

ganizing the corporation and accomplishing the purposes agreed upon."

It is also the law that in case of a conflict between the articles of association or by-laws of a corporation organized under the general law and the provisions of the Constitution or statutes of a state, the latter will prevail:

"The rule is well settled that when a corporation is organized under a general law, the law itself limits the powers of the corporation and the nature and extent of the corporate privileges; and the powers, privileges and immunities specified in the legislative act authorizing its organization cannot be added to or enlarged by the charter or other instruments. In all cases here there is conflict between the charter or articles of incorporation and the general law, the latter governs." I Thompson, supra, Sec. 174.

In the case of Durkee vs. People, 155 Ill. 354, it appears that a by-law was adopted by the incorporators and directors of a railroad corporation purporting to confer voting power upon the holders of bonds as in the case of [fol. 474] holders of stock, and such privilege was endorsed upon the bonds and also upon the certificate of stock. It was provided by the Constitution and statutes of that state that directors and managers of the corporation should be elected by the votes of the stockholders upon the cumulative system and in no other manner. Upon the question as to the voting power of the bonds, the court held as stated in the syllabi:

"A by-law of a railroad company empowering bondholders to vote at stockholders' meetings, and a provision of such bonds giving such right to vote, are void under the constitution and 'statutory provisions requiring the directors to be stockholders, and elected at the annual meeting of the stockholders by a majority in value of the stock, upon a cumulative system of voting and not otherwise."

"It is a part of the public policy of this State that the corporate business and affairs of railroad companies shall be managed and controlled by directors who are not only stockholders themselves, but are elected by the votes of those who are also stockholders."

There can be no doubt that in conferring upon the bondholders the right to convert bonds into preferred stock without the consent of the holders of common stock the plan of reorganization is inconsistent with the express language of the Constitution and statute above quoted. However, it is urged by counsel for petitioners that all stockholders participating in the reorganization are required to agree thereto by depositing their stock as therein provided, and also to agree to the articles of association by accepting stock in the New Company; and that "prospective stockholders in a corporation about to be organized may agree as they will upon the distribution among themselves of the stock to be issued and may waive rights to preference which the statute may in the absence of express agreement declare in favor of stockholders of existing corporations." The case of State vs. Swanger, 190 Mo. 561, is cited in support of this contention. In the Swanger case the articles of association provided that one-half of the stock should be common and the other half preferred, and that the voting power should be exclusively in the common stock. Under the section of the Constitution and the statutes providing for the control of corporations by the stockholders, it was contended by the Secretary of State that it was not competent for the incorporators to provide in the articles of association for an issue of preferred stock without voting power. The court held that the provision as to non-[fol. 475] voting preferred stock was but an arrangement between two classes of stockholders that does not concern the public and that "as no rule of common law or public policy is contravened thereby we can perceive no objection to the arrangement, unless it violates some express provision of our organic or statutory law." The court reviewed the law in connection with the provision of the Constitution and statute invoked and held that the articles of association were not in conflict therewith and therefore were not open to the objection lodged against them.

Protestants say that the facts before the court in the Swanger case were so different from the facts of this case that the decision of the court therein cannot be considered a precedent in this case. They conceded that the incorporators at the organization of a corporation may legally agree as to the terms of the issue of preferred stock. It is questioned whether such stockholders may waive their rights

under said section 3065 as to future issues of preferred stock and that such waiver would attach to the stock in the hands of subsequent purchasers. But they say the proposed plan goes much further. It authorizes future issues of income bonds and of common stock to which the option feature applies equally as to the original issue of common stock, and it is contended that the stockholder at the organization of the New Company could not waive rights as to such future issues.

Considering the plan as to such future issues of common stock, it appears to us that it is not alone a question of whether the original stockholder may waive his rights under the statute referred to, but rather whether the New Company may be clothed with power to make future issues of bonds and stock containing such terms and conditions, Considering the question in this form, let it be assumed that the articles of association of the New Company provided that the board of directors were authorized to make future issues of preferred stock from time to time, for which income bonds could be exchanged without the vote or option of purchase of the stockholders as required by section 3065. Could it be successfully maintained that such a provision would be upheld as against the holders of future issues of common stock? If so, then the statute would have little force except in the absence of a contrary provision in the charter. We think the statute cannot be so restricted in its effect, and that such a provision would be against the public policy of this State, as indicated by the section of the Constitution and statute upon that subject.

[fol. 476] (9) Another objection to the option feature of the plan, to which attention is called, is the possibility of the control and management of the company being placed in the hands of the bondholders. Under section 6 of Article XII of the Constitution of this State and sections 2967, 2969, 2973, 3054 and 3056, R. S. Mo. 1909, the stockholders of the corporation voting under the cumulative system are given the sole power in the selection of the directors or managers of the corporation, and the right to control the affairs of the company is thus lodged in the stockholders. In some jurisdictions the voting power is not thus confined to the stockholders, but may also be given to holders of bonds. A consideration of the foregoing provisions of our

Constitution and statutes makes it clear that it is the policy of this State that the stockholders who own the equity in the corporation, and not the bondholders who are interested only to the extent of their claim, shall have the control and

management of the corporation.

Under the option feature considered the holders of income bonds in the event the company was not prosperous would doubtless continue to own their bonds and be content to receive the interest thereon. On the other hand, if the business of the company should become prosperous and the income be sufficiently increased, the holder of such bonds could of his own volition transfer himself from the position of creditor to that of stockholder with power to participate in the control of the company. And considering the amount of such income bonds authorized by the plan, it is not improbable that the exercise of such option should result in wresting from the former stockholders the future control of the company. In the case of Wall vs. Utah Copper Co., 70 N. J. Equity Reports, 17, it is shown by the facts that the defendant company entered into a contract with the Guggenheim Exploration Company, the substance of which is stated in the opinion as follows:

"The result of this agreement, so far, if carried out, would be to give the exploration company the right, by virtue of its ownership of \$3,000,000 of convertible bonds, to acquire \$1,500,000 of new stock of the company, which would thereby be increased to \$6,000,000, and by the delivery to it of one hundred and fifty-six thousand shares of present existing stock to make it the owner of \$3,600,000, which will be a majority of the whole issue of \$6,000,000."

A dissenting stockholder was compainant in that case and asked for an injunction against the enforcement of such contract. It appears in the course of the opinion that [fol. 477] the law of that state does not materially differ from the law in this State upon the subject discussed. Discussing the option sought to be given to the bondholder by the terms of the contract, and distinguishing the case from other cases considered, the court said:

"In the present case there is no purchase of property, no appraisement of value by disinterested parties; but a simple, clear contract to give a third party the absolute right, by way of option, to purchase stock of a corporation, at a price now fixed, if at a future day that party should feel it his interest to make the purchase. I think that not only is in direct violation of the complainant's individual right as a stockholder, even if it were an issue of stock in præsenti for a fixed price, but that the optional character of the contract is vicious in itself, and not warranted by that clause in the statute which authorizes the creation and issue of new stock."

Thus far, we have considered the case only as to stock. holders agreeing to the option conferred upon the holders of income bonds and waiving their statutory rights as to the issue of preferred stock. But the case presented to us is quite different from that in which all the stockholders were assenting to such option. The holders of common stock in a substantial amount are before this Commission asserting rights under the law which they unquestionably possess as stockholders in the present company, but of which they will be deprived under the proposed plan if adopted. The purpose of the reorganization of a corporation is that the old company may be refinanced and placed upon its feet, or a new company organized, in order to preserve the rights of those interested in the old company. If a new company is to be organized the rights of the stockholders in the old company should not be lightly considered. In view of these facts and of the constitutional and statutory provisions, upon which the protesting stockholders base their contention, the question is presented whether this Commission is warranted in approving a plan by which the stockholder would be given the alternative of losing his investment by refusing to enter the New Company, or of surrendering the stock he now holds, together with the legal rights and privileges attaching thereto, and accepting stock in lieu thereof in which such rights are waived by his agreement and assent. We think not. It may be that he will lose his investment, if the plan should fail, but that is a legal question to be dealt with by the courts.

Whether we look only to the stockholders as voluntarily agreeing to the plan and taking stock in the New Company, [fol. 478] or to the holders of stock now before us objecting to being coerced into such plan, our conclusion is that the option given to the holders of income bonds to convert them

into preferred stock without the consent of the holders of common stock is inconsistent with the law and public policy of this State.

# (2) Voting trust:

The provision of the plan termed the "voting trust," under which it is proposed that the stock of the New Company shall be held and voted by trustees named therein for a period of five years, is as follows.

"The preferred and common stock of the New Company (except such number of shares as may be disposed of to qualify directors) shall be vested in the following voting trustees: Frederic W. Allen, George W. Davison, Seward Prosser, Charles H. Sabin, James Speyer, Frederick Strauss and Festus J. Wade.

"In the event of the death or failure or refusal to serve of any person designated as a voting trustee prior to the creation of the voting trust, the vacancy shall be filled by the reorganization managers. The stock shall be held by the voting trustees, and their successors, jointly (under a trust agreement prescribing their powers and duties and the method of filling vacancies), for five years, although the voting trustees may, in their discretion, deliver the stock at an earlier date. Until delivery of stock is made by the voting trustees they shall issue certificates of beneficial interest entitling the registered holders to receive, at the time therein provided, stock certificates for the number of shares therein stated, on payment of any taxes in connection with the surrender of voting trust certificates and the transfer and delivery of stock certificates, and in the meanwhile to receive payments equal to the dividends collected by the voting trustees upon the number of shares therein stated, which shares, however, with the unrestricted voting power thereon, shall be vested in the voting trustees until the stock shall be delivered, as provided in the trust agreement and in the voting trust certificates issued thereunder."

The reasons for making this scheme a part of the plan were stated by Mr. Frederick Strauss of the firm of J. & W. Seligman & Company, a witness for petitioners, as follows: "Q. What special reasons were there for a desire on the part of the present bondholders to place the stock in a vot-

ing trust?

[fol. 479] "A. The refunding bondholders and general lien bondholders, both, naturally felt that they should have a voice in the management of the property when they were asked to make sacrifices for the benefit of the stock and for the benefit of the property generally. The refunding 4s had the biggest part of the total bond issue of eighty. five million dollars. They took instead only three quarters of the principal in a new four per cent bond, the rest being taken as a contingent charge, and the issue of which they were asked to have a part is now raised to \$250,000,000 They felt as they were enlarging the amount of the mortgage and providing for the future capital of this road, that they were making a sacrifice of a fixed interest bearing obligation, in part at least, for a contingent one, and that they should have a voice in the property. The same thing applies with even greater force to the general liens because they were still taking a greater part of their principal in contingencies, contingent charges, so we thought the fairest way to do would be to take two representatives from each of the three important classes of securities, the two bonds and the stock and apportion that stock representation partly east and partly west as the stock is held partly in the east and partly in the west, and then appoint a seventh man in the manner I have just described."

"It was thought that Mr. Allen (seventh member) would represent in an admirable manner the eastern part of his own firm and eastern investors on the one hand and

in a measure also the west."

It appears from the foregoing that four of the seven trustees named are selected to represent bondholders, two to represent the stockholders, and the other, as testified to by Mr. Strauss, "would be regarded as a sort of neutral." It follows that as the bondholders name a majority of the voting trustees, the control of the New Company is to be placed in their hands for a period of five years, unless, in the discretion of the trustees, they shall terminate the trust at an earlier date. Mr. Strauss divided the voting trustees into four classes—two representing each of the two kinds of bonds, two the stockholders and one neutral.

There can be little doubt, however, that in the management of the company the natural alignment would be according to interest—the representatives of the bondholders, or creditors, on one side, and of the stockholders, the own-

ers of the property, on the other.

A voting trust is not a new device for the control of a reorganized corporation. Such schemes have been adopted [fol. 480] in many cases and the validity of such a plan of management under varied forms and provisions has frequently been passed upon by the courts. The subject is also much discussed and the decisions reviewed in the textbooks, but the authorities are not harmonious and no general rule can be deduced therefrom. See 1 Thompson on Corporations, 2 Ed., Secs. 889, 903; 3 Clark & Marshall on private corporations, Sec. 657, and cases cited.

Many nice distinctions are made in some of the cases as to the conditions under which a voting trust will be upheld and those under which it will be declared invalid as against public policy. Being a nonjudicial body, we shall not attempt to apply those distinctions to the trust now under review. One of the leading cases against the validity of a voting trust is the Shepaug Voting Trust Cases, 60 Conn. 553. The following quotation from that case is taken

from 3 Clark & Marshall, supra, Sec. 657:

"It is the policy of our law that an untrammeled power to vote shall be incident to the ownership of the stock, and a contract by which the real owner's power is hampered by a provision therein that he shall vote just as somebody else dictates, is objectionable. I think it against the policy of our law for a stockholder to contract that his stock shall be voted just as some one who has no beneficial interest or title in or to the stock directs; saving to himself simply the title, the right to dividends, and perhaps the right to cast the vote directed, willing or unwilling, whether it be for his interest, for the interest of other stockholders, or for the interest of the corporation, or otherwise. conceive to be against the policy of the law, whether the power so to vote be for five years or for all time. the policy of our law that ownership of stock shall control the property and the management of the corporation, and this cannot be accomplished and this good policy is defeated if stockholders are permitted to surrender all their discre-

tion and will, in the important matter of voting, and suffer themselves to be mere passive instruments in the hands of some agent who has no interest in the stock, equitable or legal, and no interest in the general prosperity of the corporation. And this is not entirely for the protection of the stockholder himself, but to compel a compliance with the duty which each stockholder owes his fellow stock. holder, to so use such power and means as the law and his ownership of stock give him, that the general interest of stockholders shall be protected and the general welfare of the corporation sustained, and its business conducted by its [fol. 481] agents, managers and officers, so far as may be upon prudent and honest business principles, and with just as little temptation to and opportunity for fraud, and the seeking of individual gains at the sacrifice of the general welfare as is possible. This I take it is the duty that one stockholder in a corporation owes to his fellow stockholder; and he cannot be allowed to disburden himself of it in this way. He may shirk it perhaps by refusing to attend stockholders' meetings, or by declining to vote when called upon, but the law will not allow him to strip himself of the power to perform his duty. To this extent, at least, a stockholder stands in a fiduciary relation to this fellow stockholders. For these reasons I hold that this trust agreement is void as against the policy of the law of this state."

Other cases are cited and quoted from the same author setting forth the opposite view:

Section 6 of Article XII of the Constitution of this State is as follows:

"In all elections for directors or managers of any incorporated company, each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of shares so held by him or her in said company, multiplied by the number of directors or managers to be elected at such election; and each shareholder may cast the whole number of votes, either in person or by proxy, for one candidate, or distribute such votes among two or more candidates, and such directors or managers shall not be elected in any other manner."

Section 2973, R. S. Mo. 1909, is almost identical in its provisions with said section 6 of the Constitution. No case decided by an appellate court of this State has been called to our attention in which said section of the Constitution and statute were construed authoritatively as to the validity of a voting trust. In the case of Barrie vs. United Railways Co., 138 Mo. App. 557, it is shown by the facts stated that the management and control of the defendant company was conferred by the stockholders upon a voting trust, in many respects similar to that now before us, and the court strongly disapproved of such a scheme of corporate control. As stated in the opinion, the validity of the trust was not in judgment, and the views of the court were expressed thereon only, lest by silence an inference of approval should be drawn. The court said (l. c. 665):

[fol. 482] "It is possibly true that new stockholders came in after 1904, but that cannot affect the matter, for under the tripartite agreement and the voting trust, no matter how many new stockholders came into the corporation, the control and management of its affairs was to be kept, or is provided to be kept, for a period of five years, in the voting trust, the majority of whom were the same gentlemen who had charge of the property from the inception of the consolidation of the street railway lines. We do not mean to be understood here as recognizing this voting trust as a lawful arrangement under the laws of this State. Nor are we here deciding that it is invalid. Such an arrangement is recognized under the laws of the State of New York. these voting trusts being limited to a term of five years, but New York has not the same provisions that the State of Missouri has in her laws. Our laws, as well as our Constitution, provide that the business and affairs of corporations shall be managed by a board of directors, all of whom shall be elected annually, for a term of one year, with the provision, however, that a corporation may provide by its by-laws or articles of association for a division of its board into three classes, and the subsequent annual election of one-third of the number thereafter for a period of three years. That is to say, the longest term under our corporate law the same persons elected can remain in office as directors under one election, is for a period of three years, even then one-third of their number must be elected every

In effect this is a legislative and possibly a constitutional construction, or inhibition against the holding over, under one election of a director for a longer period than three years. The object of this is manifest. Its our. pose is to guard against holding in a few hands in perpetuity the business and management of a corporation and to give all stockholders an opportunity, at least every year to be heard by their voices and votes in the election of those who are to manage its affairs. So far do our Constitution and our laws carry this, that we have in this State the right of cumulative voting, by which the stockholder can multiply his vote by the number of directors to be elected annually. The stockholders in these two corporations have seen fit, however, to continue the affairs of their companies at least of the United Railways, under the same management for a period of five years; that management is composed, in its controlling numbers and membership, of the very same gentlemen who have had the financial control of these two corporations ever since 1899 at least. [fol. 483] press our views on this voting trust here in passing, as we are bound to refer to it, lest by silence we shall be held to have sanctioned it."

Though what is said in the Barrie case is merely obiter. and so stated, it is evidence that the court gave the matter careful consideration, and as it is the only pronouncement of an appellate court of this State upon that question, it is persuasive authority with this Commission when applied to the facts of this case. It seems clear to us that the intention and purpose of said section 6 of the Constitution and the corresponding section of the statutes was to place the election of the directors of corporations and therefore the management and control thereof, in the hands of the shareholders. The right given to the shareholder to vote by proxy is merely a convenience and implies that when the vote is thus east it is in accord with the interests and view of the shareholder equally as if east by him in person. As shown by the testimony and the plan under consideration, four of the seven voting trustees represent the bondholders of the corporation, and but two, the stockholders and these trustees as individuals, select the board of directors. The trustees are not required to consult the shareholders, but are authorized to act independently of them, and may act

in opposition to the wishes and direction of the share-

holders, if so disposed.

In the recent case of Venner vs. Chicago City Rv. Co., 258 Hl. 523, the court recognizes the rule that a voting trust agreement is invalid which provides that (1, c. 541) "the stock of the corporation is to be voted or its affairs managed by the determination of persons other than its stockholders or by a minority of its own stockholders," and citing many authorities in support thereof. Under these facts and conditions we think it cannot fairly be said that the board of directors thus selected were elected by the shareholders of the corporation within the meaning of our Constitution and statutes. It is said that "the Constitution, statutes and decisions of the various jurisdictions are the principal sources of information" (10 Enc. of Ev., 450) as to the public policy of a state, and after considering the provisions of our Constitution and statute and the decision of the court of appeals cited, it is our conclusion that the voting trust provided for in the plan of reorganization is against the public policy of this State.

### [fol. 484] (3) Allotment of common stock:

A third objection by the stockholders is that if they accept the plan they are to receive in the New Company only 85 per cent of the stock they now hold in the present company. This question involves matters of private agreement between the interested parties, which, as here-fore held, this Commission is without authority to decide.

# (4) Reorganization expenses:

(10) Vigorous objections were made by some of the protesting stockholders as to certain proposed organization expenses. The petition contains the following blanket items of proposed reorganization expenses:

"Improvements and betterments, additions, acquisitions including equipment, court costs and other legal expenses, including compensation and disbursements of trustees of existing mortgages; reorganization managers' compensation; syndicate commissions; engraving of new securities; accountant and other expert fees and expenses; charges for listing securities on various stock exchanges;

compensation and disbursements of committees and others representing existing securities, including depositaries; organization, franchise and other taxes, including stamps and other organization and miscellaneous expenses; contingencies, etc.; balance to New Company as additional working capital, \$6,833,631."

In re Investigation of St. Louis & San Francisco Railroad Receivership, 29 I. C. C. 139, l. c. 153, the Interstate Commerce Commission severely criticised the former financial policy and management of said railroad company for the payment of "extravagant rates of discount, including the payment of premiums on retired issues and commissions

to banks and bankers on such issues."

Section 57 of the Public Service Commission law of this state makes it incumbent on this Commission to find as a fact and state in its order authorzing the issuance of stock. bonds, notes and other evidences of indebtedness, "the purposes to which the issue or proceeds thereof are to be applied, and that, in the opinion of the Commission, the money, property or labor to be procured or paid for by the issue of such stock, bonds, notes or other evidence of indebtedness is or has been reasonably required for the purposes specified in the order." Such has been the construction placed upon a similar statute in New York. People ex rel. Delaware & Hudson Co. vs. Stevens, 197 N. Y., l. c. 9; People ex rel. [fol. 485] Binghampton Light, Heat & P. Co. vs. Stevens. 203 N. Y. 7; People ex rel. T. A. Ry. Co. vs. Public Serv. Com., 203 N. Y. I. c. 310, and People ex rel. W. S. R. R. Co. vs. Public Serv. Com., 210 N. Y. 456.

Witness Frederick Strauss, representing J. & W. Seligman & Company, one of the reorganizers, testifying in this case, could not enumerate the amounts for the specific items for which the said expenditure of \$6,833,631 was to be made, or for the several various reorganization expenses eumerated in the petition. Witness James Speyer, representing Speyer & Company, one of the reorganizers, when testifying in this case corroborated the testimony of Mr. Strauss in regard to such indefinite proposed expendi-

tures.

The testimony is undisputed that at this time it cannot be known as to the several amounts provided for reorganization expenses. While this Commission feels that reason-

able and just expenses for counsel and reorganization managers and other various necessary expenses in connection with a reorganization of this magnitude should be paid, vet it will not approve of extravagant or wasteful expenditures in connection with such reorganization. While the Commission will authorize the blanket expenditure as provided in the petition not to exceed the sum of \$6,833,631, yet it will attach to the order authorizing such expenditure, and will require that a properly itemized statement for each proposed expenditure shall be submitted to the Commission by the New Company, with a certificate of one of its officers, duly verified, that such expenditure is reasonable and just, and the Commission will then determine the specific amount to be allowed therefor, and authorize the issuance of such securities for that specific item by supplemental order. In this way the stockholders and the public will be fully protected by preventing either needless or extravagant expenditures in the reorganization of this great property. The evidence at this time is not sufficient for the Commission to pass upon each specific item of proposed expenditure and the matter will be handled in the final order to be issued by this Commission authorizing the new corporation to make the expenditures of said \$6,833,631, as herein provided.

### VII

# Stock and Bond Bonuses Disallowed

[11] Certain questions are involved in the plan as presented relating to the payment of bonuses on the exchange [fol. 486] of certain bonds of the Old Company and the first and second preferred stock of the Old Company for bonds and common stock of the New Company.

As heretofore stated, section 57 of the Public Service Commission law of this state makes it incumbent on the Commission to state in this order authorizing the issuance of stocks or bonds "the purposes to which the issue, or pro-

ceeds thereof, are to be applied."

# (1) Bond bonuses:

The plan provides for the exchange of the \$69,384,000 of the five per cent general lien bonds, which are now outstanding in the hands of the public for securities to be issued by the New Company, namely, \$17,346,000 of the four per cent prior lien bonds, \$19,658,568 of the six per cent cumulative adjustment bonds, and \$38,161,200 of the five per cent income bonds, making the total securities of \$75, 165.768 to be given in exchange for the said \$69.384,000 of the four per cent general lien bonds of the old company This makes a bonus of \$5,781,768, or an increase of that amount of new securities over old securities for which the exchange is proposed to be made. The Commission does not find the fair value of the property as set out elsewhere in this report to warrant the issuance of any additional amount of bonds to be given in exchange as a bonus as provided by the plan as herein stated. The Commission will only authorize the issuance of \$17,346,000 of the four per cent prior lien bonds, \$17,346,000 of the six per cent cumulative adjustment bonds, and \$34,692,000 of the five per cent income bonds, making the total of \$69,384,000 of new securities which may be given in exchange, at par, for the \$69,384,000 of general lien bonds of the Old Company.

### (2) Stock bonuses:

The testimony shows that the St. Louis and San Francisco Railroad Company has \$5,000,000 of first preferred stock, \$16,000,000 of second preferred stock and \$29,000,000 of common stock, all of which has been authorized and (except \$14,237.70) has been issued and is now outstanding in the hands of the public. The plan provides that the common stock of the Old Company of \$29,000,000 shall be exchanged for common stock of the New Company on the basis of \$85 of new stock for \$100 of the stock; that said \$5,000,000 of first preferred stock of the Old Company shall be exchanged for common stock of the New Company on the [fol. 487] basis of \$125 of new stock for \$100 of said first preferred stock, which would make a bonus of \$1,250,000 to the holders of the first preferred stock in the Old Company: that said \$16,000,000 of second preferred stock of the Old Company shall be exchanged for common stock of the New Company on the basis of \$105 of new stock for \$100

of said second preferred stock, which would make a bonus of \$800,000 to the second preferred stockholders in the Old Company, and a total bonus to the first and second preferred stockholders in the Old Company of \$2,050,000. Commission does not find that the fair value of the property as set out elsewhere in this report warrants the issuance of any amount of stock to be given in exchange as provided in the plan as bonuses to the first and second preferred stockholders of the Old Company. The Commission will authorize the issuance of \$5,000,000 of common stock of the New Company to be given in exchange to the holders of the \$5,000,000 of first preferred stock of the Old Company, and the issuance of \$16,000,000 of common stock of the New Company to be given in exchange to the holders of the \$16,000,000 of second preferred stock of the Old Company, and \$24,650,000 of common stock in the New Company to be given in exchange for the \$29,000,000 of common stock of the Old Company, making the total amount of common stock of the New Company to be issued in exchange for the stock of the Old Company of \$45,650,000.

### VIII

### In Conclusion

It is shown by the testimony that the plan and agreement under consideration is the result of much labor on the part of those who have been promoting it, and of concessions and compromises on the part of the many conflicting interests dealt with. It is also shown and admitted by the protesting shareholders that the plan has many commendable features which should be included in any plan for the reorganization of this company. It clears the properties of the several underlying and overlapping mortgages which prevent the securing of new capital for necessary extensions, additions and betterments, and in lieu thereof provides for one general prior lien mortgage covering all of the properties and under which bonds may be issued from time to time to provide adequate capital for needed future requirements.

The plan, as hereinbefore stated, contemplates a reduction in capitalization of \$29,678,868, or 8.31 per cent of the entire capital obligations of the Old Company, making a

[fol. 488] reduction in the total annual fixed charges (including K. C., Ft. S. & M. system bonds undisturbed) of \$5,728,135, or a reduction of 38.47 per cent; and a reduction in the total annual charges, fixed and contingent (including K. C., Ft. S. & M. system bonds undisturbed) of \$1,362,205, or 9.15 per cent. The disallowance of the total sum of \$7,831,768 for stock and bond bonuses as hereinbefore stated, still further reduces the total capitalization of the New Company under that of the Old Company the sum of \$37,510,636. This will also make a substantial change

in the percentages as above set forth.

Although it requires the shareholders to put into the New Company \$25,000,000 in cash, it also provides that for all of said sum the shareholders will receive an equivalent amount in prior lien mortgage bonds. And if the shareholders should be unable to raise the necessary amount of cash to pay his assessment and take his allotment of bonds, a loan syndicate is provided which will loan him the money on the security of his stock and bonds. On account of the many commendable provisions, it is with reluctance that we have felt constrained to hold that the plan is in conflict with our Constitution and s-atutory law, as construed by our court in the two particulars heretofore considered, namely, the convertibility of income bonds into preferred stock, and the voting trust agreement. The provision for the convertibility of income bonds was not included in the plan as first drafted and partially agreed to. As to the voting trust provision, it is sufficient to add to what has already been said, that this railroad system and its affairs have been managed and controlled for over two years through a receivership in the Federal Court. The testimony shows that under the receivership, notwithstanding the adverse business conditions through which railroads throughout the country have passed during that period, the company has been effectually and economically managed with a view of conserving the rights of all parties interested, stockholders as well as creditors. If the receivership should be wound up and the control and management of this road should pass to the New Company under the plan proposed, its control and management for next five years would pass to the bondholders and creditors, and the shareholders, notwithstanding the fact that they are required to contribute all the new cash necessary to put the company again upon its feet, would have no authoritative voice or effective control of the company's affairs. As we view our Constitution and statutes governing the management and control of railroad companies they [fol. 489] are inconsistent and irreconcilable with the scheme of the plan in that regard. A preliminary order should be entered in conformity with the views herein expressed. All concur.

### Preliminary Order

The petition of J. & W. Seligman and Company, and Spever and Company, as reorganization managers, for the reorganization of the St. Louis & San Francisco Railroad Company, and for an order authorizing the issue of stocks and bonds, and containing the proposed plan and agreement of reorganization of said railroad company, having been filed with this Commission requesting a preliminary order of approval of said plan and agreement of reorganization, as provided by the provisions of section 62 of the Public Service Commission law, and the Commission having heard proof and argument in explanation of and in support of the issuance of such preliminary order of approval of said proposed plan and agreement of reorganization of said St. Louis and San Francisco Railroad Company, and protesting nonsecured creditors and stockholders in opposition thereto. and the Commission having on the date hereof made and filed its report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, now, upon due consideration of the proposed plan and agreement of reorganization as presented and discussed, the views of this Commission in respect thereto are now expressed in this preliminary order of approval, as follows:

Ordered: 1. That this Commission will approve said proposed plan and agreement of reorganization of the St. Louis and San Francisco Railroad Company when it is hereafter duly presented to this Commission by the New Company, which is to be hereafter organized under the laws of this State, as provided therein, for the purpose of purchasing and operating the properties now belonging to said St. Louis & San Francisco Railroad Company, provided

said plan and agreement is modified to conform to the requirements and provisions set forth in the report of this Commission containing its findings of fact and conclusions thereon and referred to and made a part hereof.

Ordered: 2. That the Commission reserves its full right and authority to approve the prior lien mortgage, cumulative adjustment mortgage, and income mortgage to be hereafter issued by said New Company, as provided in said plan, as to form and substance thereof, when hereafter submitted to the Commission, before their final execution and delivery.

[fol. 490] Ordered: 3. That applicants, interveners, and any other parties interested therein, be, and they are hereby, given leave to file with this Commission a motion for a rehearing within ten (10) days after receipt of a certified copy of this order and the report filed herein.

Ordered: 4. That the Commission reserves jurisdiction of the subject matter and of the parties, for the purpose of entering such additional or supplemental order or orders herein as the facts may from time to time warrant, and that this case be continued for such further action.

Ordered: 5. That the Secretary of the Commission forthwith serve on each of said applicants and interveners a certified copy of this order and the report filed herein.

## Supplemental Order No. 1

Now, at this time, come the applicants herein, J. & W. Seligman and Company, and Speyer and Company, and pray the Commission to extend the time for filing motion for rehearing, as fixed in the preliminary order entered herein on the 22nd day of December, 1915, until and including the 15th day of January, 1916. Now, upon due consideration, it is

Ordered: 1. That the applicants, interveners and any other parties interested herein, be, and they are hereby, given leave to file with the Commission a motion for rehearing on or before the 15th day of January, 1916.

Ordered: 2. That this order shall take effect on this date. December 31, 1915.

Supplemental Report of the Commission

ATKINSON, Chairman, and Kennish, Commissioner:

1

#### Statement

On January 21, 1916, petitioners J. & W. Seligman & Company and Speyer & Company, as reorganization managers, filed their joint motion for a rehearing and for modification herein.

The Commission at the request of certain objectors granted leave to them to file suggestions on or before February 21, 1916, in opposition to said motion for rehearing and for modification.

[fol. 491] On February 18, 1916, Chas. H. Sabin, Frederick Bull, Stacy C. Richmond, Eugene V. R. Thayer, H. S. Priest, Samuel W. Fordyce, Albert T. Perkins and Festus J. Wade, as stockholders, filed certain suggestions for a modification of the original report and order entered herein; and also submitted a voting trust in blank form for consideration, and which if approved by the Commission and adopted by said reorganizers would meet with the approval of said stockholders.

On January 10, 1916, a protest by the Corporation Commission of the State of Oklahoma was filed with this Commission.

On January 24, 1916, the Railroad Commission of the State of Arkansas notified this Commission that if a rehearing was granted it desired to be represented at such rehearing.

On February 10, 1916, the Cape Girardeau Pressed Brick Company, an alleged unsecured creditor against said St. Louis & San Francisco Railroad Company to the amount of \$8,000, by its attorneys, Oliver and Oliver, entered its appearance as an interested party in said reorganization.

Under date of February 17, 1916, formal notice of withdrawal by J. & W. Seligman & Company and Spever & Com-

pany of their application for a rehearing and for modification of the order of the Commission was filed with this Commission. It was stated in the letter accompanying said formal notice of withdrawal that it was the intention of said reorganizers to bring out a modified plan or reorganization which it was hoped would be considered by the Commission to conform to its former report and order. Up to this date no proposed modified plan has been received by the Commission from said reorganizers or any further explanation in relation thereto.

We shall proceed to treat the proposed modifications submitted by Mr. Wade and other stockholders in the nature of a motion to modify the original report and order entered herein, and will consider all briefs and suggestions of counsel representing the various objectors as applying to such proposed plan of reorganization so submitted by said stock-

holders.

### II

### Accrued Interest Allowed

I has been called to the attention of the Commission that. by inadvertence in its original report, it erred in disapprov-[fol. 492] ing the plan in so far as it provides for the payment to holders of present general lien five per cent gold bonds of \$33,33 in adjustment mortgage bonds of the New Company for each \$1,000 general lien bond in adjustment of unpaid interest on said general lien bonds at five per cent from November 1, 1914, to July 1, 1915. Such payment is in no sense a bonus, but is a payment in securities at par of accrued interest of a secured debt of the present St. Louis & San Francisco Railroad Company. The Commission is advised through the reorganization managers that the receivers of the Railroad Company will have in cash to be turned over to the New Company as of March 1, 1916, more than \$2,500,000 which will be added to the assets of the New Company and as a proper capitalization of the New Company. This amount will more than pay the accrued interest as above stated. The former report and order should be so modified as to allow the above accrued interest as herein stated.

#### III

# Interest of Income Mortgage Bonds

[12] It is suggested by said stockholders that the plan be further modified by allowing the general lien bondholders to receive fifty per cent of their holdings in six per cent income mortgage bonds instead of fifty-five per cent in five per cent income mortgage bonds. In other words, it is suggested that in view of the formal order of the Commission disallowing the extra five per cent in income mortgage bonds as a bonus that the rate of interest of said bonds should be increased from five per cent to six per cent. By increasing the rate of interest from five per cent to six per cent, it will make quite a material increase in the contingent charges against the New Company. As shown in our original report, we do not think from the estimated income of the New Company that even the contingent charges should be increased above what we determined therein. To allow an increase in the rate of interest from five per cent to six per cent on the ground of the disallowance of a five per cent to six per cent on the ground of the disallowance of a five per cent bonus does not meet with the approval of the Commission, and for that reason the plan should not be modified by increasing the rate of interest of the income mortgage bonds from five per cent to six per cent.

#### IV

## Voting Trust

[13] The serious objection to the voting trust feature of the original plan of reorganization was that it placed the [fol. 493] selection of the voting trustees, and consequently the election of the board of directors and the management and control of the company, in the hands of the bondholders instead of the stockholders, as provided by the Constitution and laws of this State. The modified plan now considered proposes the substitution of two new names of voting trustees in lieu of two named in the original plan, but makes no change whatever as to the method of the selection of the trustees. It is apparent that a change of trustees does

not relieve the voting trust of the objectionable feature to which attention was called in the former opinion. The Commission did not object to the personnel of the trustees first named, but rather to their selection by the bondholders, and as to that feature no change has been made in the plan as modified.

A brief examination of some of the more inportant provisions relating to the powers of the voting trustees as set forth in said proposed voting trust agreement as submitted by said stockholders may be of interest, and we here quote

same as follows:

"Second. On the - day of -, 19-, or whenever, earlier, the voting trustees shall decide to make such delivery, the voting trustees in exchange for, and upon surrender of, any stock trust certificates then outstanding. will, in accordance with the terms thereof, and on payment. if the voting trustee shall so require, of a sum sufficient to reimburse them for any stamp tax or other governmental charge in connection with such delivery, deliver at their office or agency in the Borough of Manhattan, in the City of New York, certificates of stock of the - Railroad Company, and may require the holders of stock trust certificates to exchange them for certificates of capital stock. Whenever, pursuant to the foregoing provisions of this article, certificates of capital stock of the - Railroad Company shall become deliverable, or at any time thereafter, the voting trustees may deposit with - Trust Company of New York, or other trust company in good standing having an office in the Borough of Manhattan, in the City of New York, stock certificates, duly endorsed in blank or accompanied by proper instruments of assignment and transfer in blank, duly executed to a par amount, of each class of stock, equal to the amount of stock called for by the outstanding stock trust certificates for such class of stock, with authority to such depositary to make delivery thereof in exchange for stock trust certificates, and thereupon all further obligation or duty of the voting trustees under this agreement shall terminate.

[fol. 494] "Third. Any voting trustee may, at any time, resign by delivering to the other voting trustees at the office of the agent of the voting trustees for the transfer

of stock trust certificat; in writing, his resignation, to take effect ten days thereafter, or on its earlier acceptance by the voting trustees. In cause of the death, resignation or the inability of any voting trustee to act, the vacancy so occurring shall be filled by the appointment of a successor or successors, to be made as follows: Any successor in the line of succession to Frederick Strauss shall be appointed by the firm of J. & W. Seligman & Co., as such firm may from time to time be constituted; any successor in the line of succession to James Spever shall be appointed by the firm of Speyer & Co., as such firm may from time to time be constituted, and any other successor shall be appointed by two thirds of the other voting trustees. such appointments shall be made by written instrument. The term voting trustees as used herein, and in said stock trust certificate, shall apply to the parties of the second part and their successors hereunder. Notwithstanding any change in the voting trustees, the voting trustees for the time being may adopt and issue stock trust certificates in the names of the original voting trustees, the parties hereto of the second part.

"Fourth: The action of a majority of the voting trustees expressed from time to time at a meeting shall, except as otherwise herein stated, constitute the action of the voting trustees and have the same effect as if assented to by all. At any meeting of the voting trustees, any voting trustee may vote in person or by proxy to any other voting trustee. The voting trustees may adopt their own rules of procedure. Any voting trustee may act as a director or officer of the Railroad Company or of any subsidiary or controlled company; and he, or any firm of which he may be a member. or any corporation of which he may be stockholder, director or officer, may contract with the Railroad Company or any subsidary or controlled company, or be or become pecuniarily interested in any matter or transaction to which the Railroad Company or any subsidiary or controlled company may be a party, or in which it may in any way be concerned, as fully as though he were not a voting trustee.

"Fifth. In voting the stock held by them (which they may do either in person or by proxy signed by any four of them and running to any one or more of them or to any other person or persons) the — voting trustees will exercise their best judgment from time to time to select suitable directors, to the end that the affairs of the —— Rail [fol. 495] road Company shall be properly managed, and, in voting and in acting on other matters which may come before them at any stockholders' meeting, will exercise like judgment; but they assume no responsibility in respect to such management or in respect of any action taken by them or in pursuance to of their consent thereto as such stockholders, or pursuant to their votes so cast, and no voting trustee incurs any responsibility by reason of any error of law or any matter or thing done or omitted under this agreement except for his own individual malfeasance.

"Sixth. The voting trustees possess, and shall be entitled in their discretion to exercise, all rights and powers of absolute owners of said stock, including the right to vote for every purpose and to consent to any corporate act of said Railroad Company. The voting trustees will not, however, during the pendency of this agreement, vote in respect of the shares of the capital stock of the Railroad Company held by them, to authorize the creation of any mortgage in addition to said prior lien mortgage. adjustment mortgage and income mortgage, nor any increase in the amount of the preferred stock of the Railroad Company at present authorized, viz., \$200,000,000, except, in each instance, with the consent, given at a meeting called by the voting trustees for the purpose, of holders of a majority in amount of the trust certificates for preferred stock outstanding, and of a majority in amount of such part of the trust certificates for common stock as shall be represented at such meeting, the holders of each class of trust certificates voting separately and either in person or by proxy."

It will be observed that under the fourth paragraph "any voting trustee may act as a director or officer of the Railroad Company or of any subsidiary or controlled company; and he, or any firm of which he may be a member, or any corporation of which he may be a stockholder, director or officer, may contract with the Railroad Company or any subsidiary or controlled company, or be or become pecuniarily interested in any matter or transaction to

which the Railroad Company or any subsidiary or controlled company may be a party, or in which it may in any way be concerned, as fully as though he were not a voting trustee." Thus a voting trustee selected to manage the property of the stockholders is authorized to deal with himself in such fiduciary relation, which is clearly repugnant to the law as to the duties of trustees acting in a fiduciary relation.

[fol. 496] Furthermore, such provisions are in direct violation of Section 3161, Mo. R. S. 1909, which provides as

follows:

"No president, director, officer, agent or employe of any railroad company, or other corporation operating a railroad, shall hereafter be interested in any manner, directly or indirectly, in furnishing materials or supplies to such cor pany; no- shall such officer, agent or employe of any rain oad company, or other corporation owning, controlling or managing a railroad, be interested, directly or indirectly, in the business of transportation as a common carrier of freight or passengers over the works owned, leased, controlled or operated by the corporation or association of which he is an officer, agent or employe. Any president, director, officer, agent or employe of any such railroad company who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum of not less than two hundred dollars nor more than one thousand dollars. or by imprisonment in the county jail for a term of not less than three months nor more than one year, or by both such fine and imprisonment, and each day any such violation continues shall be a separate offense."

Under the fifth paragraph it is provided that the voting trustees "assume no responsibility in respect to such management or in respect to any action taken by them or in pursuance to their consent thereto as such stockholders, or pursuant to their votes so cast, and no voting trustee incurs any responsibility by reason of any error of law or of any matter or thing done or omitted under this agreement except for his own individual malfeasance." Thus it appears that the voting trustees are not to assume any

responsibility although acting for and instead of all stock-

holders of the New Company.

Under the sixth paragraph it is provided that preferred stock may be issued by the voting trustees when authorized by the "holders of a majority in amount of the trust certificates for preferred stock outstanding, and of a majority in amount of such part of the trust certificates for common stock as shall be represented at such meeting." This provision of the voting trust is in direct violation of section 10 of Article XII of the Constitution of this State which provides that no corporation shall issue preferred stock without the consent of all of the stockholders. Section 3065 Mo. R. S. 1909 follows the provision of the Constitution. [fol. 497] We have very carefully reconsidered our action in disapproving the voting trust provision submitted in the original plan of reorganization in the light of briefs of counsel, both in opposition to such action and in support thereof, with the result that we still adhere to our former views

### V

### In Conclusion

In all other respects the motion of said stockholders for a modification is hereby denied. The report and order entered herein on December 22, 1915, should be and is hereby modified in conformity with the views expressed in this supplemental report. A supplemental preliminary order should be entered in conformity with the views herein expressed.

Shaw and Bean, CC., concur.

McQuillin, C., concurs in separate report.

# Separate Concurring Opinion

McQuillin, Commissioner: I concur in the supplemental report and think a brief consideration of the principle involved should be given respecting the denial by the applicants and other parties herein of the power of the Commission to ascertain, first whether the plan is consistent with the Constitution and laws of the State, and, second, whether it harmonizes with the public policy of the State.

The precise point of this contention is that in seeking to

determine these matters the function of interpreting laws must be exercised, and as this is essentially a judicial function, it may not be invoked by the Commission, a nonjudicial body. Therefore, as the Commission is not a court and is not possessed of any judicial attributes whatever, it is mere usurpation of power for it to attempt to say that the plan of reorganization is or is not in contravention of the organic law of the State, or, out of harmony with its sound public policy as evidenced by its laws. It is conceded that the avowed function of the Commission is to seek to proteet the public interests, but in so doing it is argued that it should limit its activities to discover whether (1), the amount of capitalization, and (2), the fair value of the properties involved, are ample to insure adequate trans-

nortation service.

Thus restricted, if the amount of capitalization and property are found sufficient for the purpose designed, the further question whether the plan is legal or illegal, or replete with or devoid of equity, tested by the will of the people [fol. 498] of the State, as that will appears expressed in the Constitution and laws, should be put out of view. Obviously the acceptance of this principle and giving it free application would destroy utterly the power of the Commission to safeguard the public interest and reduce it to a mere registering machine, to register, without question, the desire of any applicant committee of reorganizers. Thus the Commission would be compelled to surrender the undoubted right of the State to enforce its supreme control and laws relating to railways. Moreover, such abrogation or abridgment of the powers of the State might result in the approval of a plan in direct and flagrant violation of our Constitution and laws, and have the certain effect of deceiving and deluding the public and investors into the belief that the plan conformed precisely to all legal requirements and was entirely fair and equitable. An approval by the Commission of the plan would be a finding upon which the public would have the right to rely, and upon which it incontestibly would rely.

It is idle to expect that the Commission, or any public officer vested with responsibility, should sanction a plan without reasonable assurance of its fairness, equity and entire legality. The legality may be ascertained only by knowing the essential mandatory legal requirements; these may be known only from an examination of the law; and the intention of the law may be arrived at only from its reasonable interpretation.

Such powers may be exercised by any public officer, whether executive or administrative or merely ministerial. The public officer in all of his official actions must follow.

not disregard, the law.

The Commission has found as a fact, because of the express prohibition of the law, that the proposed voting trust is illegal, in that it takes the absolute control of the railway corporation out of the hands of its stockholders for a period of five years, where it is placed by the Constitution, and lodges such control in the hands of certain persons constituting a board of trustees, selected by and representing the reorganizers only.

# Supplemental Preliminary Order No. 1

The petition of J. & W. Seligman & Company, and Speyer & Company, as reorganization managers, for the reorganization of the St. Louis and San Francisco Railroad Comfol. 499] pany, and for an order authorizing the issue of stocks and bonds, and containing the proposed plan and agreement of reorganization of said railroad company, having been filed with this Commission requesting a preliminary order of approval of said plan and agreement of said reorganization, as provided by the provision of section 62 of the Public Service Commission law; and the Commission having on December 22, 1915, made and filed its report containing its findings of fact and conclusions thereon.

It further appearing to the Commission that certain stockholders thereafter submitted to the Commission for consideration certain proposed modifications of said orig-

inal report and order.

Now, upon due consideration of the proposed plan and agreement of reorganization as presented and modified by said original report and order of this Commission, and the motion of said stockholders for modification on said report and order, the views of this Commission in respect thereto are now expressed in this supplemental report and preliminary order of approval, as follows:

Ordered: 1. That the Commission does hereby approve said proposed plan and agreement of reorganization of the St. Louis & San Francisco Railroad Company, provided said plan and agreement are modified to conform to the requirements and provisions as set forth in the original report of this Commission, dated December 22, 1915, and as further modified in this supplemental report and order of the Commission containing its findings of fact and conclusions thereon, and both of said reports are referred to and made a part hereof.

Ordered: 2. That the Commission reserves its full right and authority to approve the prior lien mortgage, cumulative adjustment mortgage, and income mortgage to be hereafter issued by said New Company, as provided in said plan, as to form and substance thereof, when hereafter submitted to the Commission, before their final execution and delivery.

Ordered: 3. That the Commission reserves jurisdiction of the subject-matter and of the parties, for the purpose of entering such additional or supplemental order or orders herein as the facts may from time to time warrant, and that this case be continued for such further action.

[fol. 500] Ordered: 4. That the Secretary of the Commission forthwith serve on each of said applicants and interveners a certified copy of this order and the supplemental report filed herein.

Ordered: 5. That the petitioners, J. & W. Seligman & Company and Speyer & Company, as reorganization managers, be and they are hereby required to notify the Commission, in the manner required by section 25 of the Public Service Commission law, within thirty days after receipt of a certified copy of this order and the report filed herein, whether the terms of this order are accepted.

Public Service Commission Reports, Vol. 4, Missouri, March 25, 1916, to March 9, 1917, pp. 95-100

### Case No. 974

In the Matter of the Application for Authorization of the Reorganization of St. Louis & San Francisco Railroad Company and for an Order Authorizing the Issue of Stock and Bonds

Submitted May 31, 1916. Decided June 5, 1916

Motion for Rehearing Overruled June 21, 1916. Second Motion for Rehearing Overruled June 26, 1916

## Report of the Commission

The Commission:

This is an application for the authorization of a reorganization of the St. Louis & San Francisco Railroad Company under the laws of this state. The plan, except as hereinafter noted, is substantially the same as that filed with this Commission by the same applicants in case No. 815, decided December 22, 1915. The facts are fully set forth in the report of the Commission in that case (3 Mo. P. S. C. 664) and need not be repeated here.

While the plan as proposed in said case No. 815 was commendable as to many of its features, two objections thereto made by a large number of stockholders were sustained by the Commission, namely, (1) the provision authorizing the holders of five percent income bonds of the new company to convert the same into six per cent preferred stock of like par value, without the consent of the holders of the common stock, and (2) the provision for the management of [fol. 501] the business affairs of the new company for a period of five years by a voting trust consisting of seven members, all of whom were to be selected by the representatives of the bondholders. There were other minor objections, but as they are not regarded as vital, they need not be referred to. The Commission then filed its report and made and entered an order (which, so far as consistent, are hereby made a part hereof) refusing to authorize the

organization prayed for with the said two objectionable provisions, each of which was considered in conflict with the Constitution and laws of this state.

In the plan now proposed the provision for the convertibility of income bonds has been eliminated, but the voting trust provision remains.

(1) All of the stockholders appearing in the case, including those who opposed the first reorganization under the plan then proposed, are now urging the authorization of the reorganization under the present plan. The position of these stockholders is that on account of the vast amount of capital necessary to finance the reorganization, they have been and are unable, either to provide the necessary capital or to induce the promoters of the present plant who represent the bondholders, to eliminate the voting trust provision: that if the reorganization is not effected under the laws of this state, the domicile of the present company, and the state in which the largest mileage of the railway system is situate, it will result in great financial loss to them. These stockholders still maintain that the voting trust is illegal, and they do not ask the Commission to recede from its former holding in that regard, but as no authoritative ruling has ever been made by the Courts of this state upon that question, and as the Public Service Commission law does not expressly require the Commission to pass upon the validity of such a provision of the reorganization plan, and as the most serious objection to the former plan has been removed, they now earnestly urge the Commission to authorize the reorganization, leaving the legality of the voting trust to be raised and adjudicated in a court proceeding, which they assure us will be done. Whether these stockholders would thus contest the voting trust in the courts, if the reorganization should be authorized and effeeted under the laws of this state, we cannot know, and such promise should have no influence upon our action in the premises However, there is no doubt that the proper public officer, or any person interested, could institute a [fol, 502] proceeding in any court of competent jurisdiction in this state, and thus have the legality of the voting trust authoritatively and finally determined.

We are fully aware that we may bar the reorganization in this state because of this proposed form of corporate control. In our former report we expressed the belief, and now believe, such form of control to be repugnant to our laws, yet, on the other hand, since the courts of this state have not yet spoken and we cannot authoritatively determine the question, we are not inclined to take such action.

(2) Under these facts, the question confronts us whether this Commission is warranted in excluding the reorganization from this state, thereby compelling the promoters to go to another state for that purpose, because of a provision against which the public and all parties interested can be fully protected at any time after the reorganization by a proceeding in a judicial tribunal. We have hesitated as to our duty in the premises, but after full consideration of the interests of the public and of the parties to be most seriously affected by our action, we have concluded to authorize the reorganization of the Company to be incorporated under the laws of this state, upon the terms and conditions as provided in an order of this date, leaving the validity of the voting trust for adjudication in the courts.

It is so ordered.

### Order

The petition of J. & W. Seligman and Company, and Speyer and Company, as reorganization managers, for the reorganization of the St. Louis & San Francisco Railroad Company, and for an order authorizing the issue of stocks and bonds, and containing the proposed plan and agreement of reorganization of said railroad company, having been filed with this Commission requesting a preliminary order of approval of said plan and agreement of reorganization as provided by the provisions of section 62 of the Public Service Commission law, and the Commission having heard proof and argument in explanation of and in support of the issuance of such preliminary order of approval of said proposed plan and agreement, and the Commission having on the date hereof made and filed its report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, now, upon due consideration, it is,

Ordered: 1. That the Commission hereby authorizes the reorganization of the St. Louis & San Francisco Railroad

[fol. 503] Company by the incorporation of a New Company under the laws of Missouri for the purpose of purchasing and operating the properties described in the reorganization application.

Ordered: 2. That the new Company when organized under the laws of this state may execute and deliver its prior lien mortgage, its adjustment mortgage and its income mortgage, and mortgage thereunder all its railroads, franchises and other properties at any time acquired by it, upon application to the Commission, as follows:

\$93,398,500 prior lien mortgage bonds, Series A, 4 per cent.

25,000,000 prior lien mortgage bonds, Series B, 5 per cent. 40,547,818 adjustment mortgage bonds, 6 per cent.

35,192,000 non-cumulative income mortgage bonds, 6 per cent.

Ordered: 3. That the New Company when organized under the laws of this state may issue preferred and common stock, upon application to the Commission, as follows:

\$7,090,000 non-cumulative preferred stock, 6 per cent. 48,480,000 common stock.

and such additional amounts of preferred stock and common stock as this Commission may hereafter authorize to settle claims of general creditors of the railroad company, provided that the total amount to be issued for the purchase of the property, the payment of general creditors and the acquisition of the sums of money as shall actually be paid in cash, shall not exceed the sum of \$319,379,420.

Ordered: 4. That applicants, and any other person interested, are hereby authorized to file with this Commission a motion for a rehearing within ten days after receipt of a certified copy of this order and the report filed herein.

Ordered: 5. That the Commission reserves jurisdiction of the subject matter and of the parties for the purpose of entering such additional or supplemental order or orders herein, as the facts may warrant from time to time, and that this case be continued for such further action.

Ordered: 6. That this order shall take effect on June 15, 1916, and that the Secretary of the Commission shall forth-

with serve on applicants and interveners a certified copy of this order and the report filed herein.

[fol. 504] Ordered: 7. That the applicants be and they are hereby required to notify the Commission, in the manner required by section 25 of the Public Service Commission law, within ten days after receipt of the certified copy of this order and the report filed herein, whether the terms of this order are accepted and will be obeyed.

# Supplemental Order No. 1

It appearing that in accordance with the previous findings of the Commission the value of the properties to be acquired by the New Company in the reorganization is sufficient to permit the capitalization thereof to the amount of \$321,688,886, instead of \$319,379,420, as mentioned in the order of June 5, 1916, that said order of June 5, 1916, should be modified in the particulars hereinafter set forth; and that the report of the Commission filed on said date, contained in parenthesis the following: "(which, so far as consistent, are hereby made a part hereof)," which should be omitted therefrom now, upon due consideration, it is,

Ordered: 1. That the paragraph designated "Ordered: 2," in said order of June 5, 1916, be stricken out and the following substituted therefor:

"That the New Company when organized under the laws of this state may execute and deliver its prior lien mortgage, its adjustment mortgage and its income mortgage to secure the aggregate amounts of bonds, as provided by the plan and agreement dated November 1, 1915, and mortgage thereunder all its railroads, franchises and other properties at any time acquired by it, and the New Company when so organized may, upon application to the Commission, issue and deliver its said bonds described in said plan in the following amounts:

\$93,398,500 prior lien mortgage bonds, Series  $\Lambda$ , 4 per cent.

25,000,000 prior lien mortgage bonds, Series B, 5 per cent.

40,547,818 adjustment mortgage bonds, 6 per cent. 35,192,000 non-cumulative income mortgage bonds, 6 per cent."

Ordered: 2. That the figures "\$319,379,420" contained in paragraph 4 of said order of June 5, 1916, be stricken out and the figures "\$321,688,886" be substituted therefor, and that said paragraph be further modified by striking therefrom the proviso at the end thereof, and substituting in lieu thereof the following: "provided that the total amount of [fol. 505] stocks, bonds, notes and other evidences of indebtedness to be issued in the reorganization shall not exceed the sum of \$321,688,886," so that said paragraph 3 when amended shall read:

"Ordered: 3. That the New Company when organized under the laws of this state may also issue and deliver, upon application to this Commission, its stock in the following amounts:

\$7,000,000 non-cumulative preferred stock, 6 per cent.

\$48,480,000 common stock,

and such additional amounts of preferred stock and common stock as this Commission may hereafter authorize to settle claims of general creditors of the Railroad Company, provided that the total amount of stocks, bonds, notes and other evidences of indebtedness to be issued in the reorganization shall not exceed the sum of \$321,688,886."

Ordered: 3. That the words in parenthesis contained in the report of the Commission filed June 5, 1916, namely, "(which, so far as consistent, are hereby made a part hereof)" be and the same are hereby stricken therefrom.

Ordered: 4. That the Commission reserves jurisdiction of the subject matter and of the parties for the purpose of entering such additional or supplemental order or orders herein, as the facts may warrant from time to time, and that this case be continued for such further action.

Ordered: 5. That this supplemental order shall take effect this date, that the Secretary of the Commission shall forthwith serve on applicants and interveners a certified copy of this supplemental order, and that the applicants be and they are hereby required to notify the Commission, in the manner required by section 25 of the Public Service Commission law, within ten days after receipt of the certified copy of this order and the report filed herein, whether

the terms of the order of June 5, 1916, as modified by this supplemental order No. 1 are accepted and will be obeyed.

June 19, 1914.

S. H. Cowan, being duly sworn, testified on behalf of interveners as follows:

Direct examination.

By Mr. Murphy:

The witness stated that his connection with the cases of E. B. Spiller et al. against the St. Louis and San Francisco Railroad Company and other railroad companies was that [fol. 506] he filed the petition in the case, first at Fort Worth, Texas, and also filed cases at Kansas City and at St. Louis, that all parties appeared in the cases with the understanding that the questions affecting local jurisdiction would be dismissed, and would be out of the way, and they have been accordingly dismissed; he thought that the case at Fort Worth had been dismissed, but there was some question as to the costs, the railroad did not want to pay them. (P. 37.)

In reply to the Special Master's question whether the defendant company was a party to the Kansas City litigation, the witness replied that it became a party, that subsequently there was a motion made to quash the service and all became parties at Kansas City, and the cases have so proceeded since that time. There was an application made for the confirmation of the sale of the St. Louis and San Francisco Railroad Company's properties, which was taken up before the United States Court here in St. Louis. Judgment was rendered in the case at Kansas City, from which an appeal was prosecuted. Witness tsetified that they had never received any formal notice, or any other notice, actual or otherwise, that referred to any order of the Court pertaining to the filing of claims within a certain time.

They had no knowledge of any kind or notice relative to orders of the Court fixing the time within which claims could be filed; the order of the Interstate Commerce Commission, which had been served on all the railroads, was never recognized by the receivers or the railroad company, nor listed as a judgment or liability of the railroad com-

pany; it was completely ignored.

Witness testified that he found out that the Court had made an order fixing the time within which claims could be filed, according to his recollection, at the time he came to St. Louis at the time of the confirmation in August, 1916. They went to the Clerk's office to see what had been done and there obtained information respecting it; that was after the District Court at Kansas City had rendered judgment, and before the order of confirmation of the sale. (P. 38.)

They appeared there at the session of Judge Sanborn's Court, as the matter of confirmation of the sale came on, and there gave notice to the attorneys who were present, representing the various parties,—reorganization, railroad companies, and bondholders. That notice was in writing and it was delivered in person to Mr. Evans and to some other lawyers whose names the witness did not recolfol. 507] lect. He and those with him talked to Mr. Evans about it and to some of the other lawyers from New York.

The witness identified a copy of the notice which was served on all of the attorneys and parties in interest. Several copies were made and delivered to everybody.

In reply to a question put by the Special Master, in regard to who took the appeal at Kansas City, witness replied that it was taken by the defendant.

Mr. Murphy: Mr. Miller, to shorten this up, my understanding is that Judge Sanborn made an order requiring the receivers to schedule the claims against the receivers and the railroad company. Do you know anything about that?

Mr. Miller: That an order was made, as I recall it, but if that order was made it is in writing and I don't want to give the contents of it. I may be mistaken. There was an order made, contained in Article 10 of the final decree, requiring as schedule of claims that had been filed in this cause against the railroad company, that the receivers were required to file, and another one covering claims against the receivers, as I recall it, those that were allowed in the receivership suit.

Mr. Murphy: Well, that is not my understanding of the order. I'd like to offer those orders in evidence, and we will supply them.

Mr. Miller: They are objected to on the same general

ground.

The Master: Taken subject to objection.

(Said order omitted here as same is embodied in Intervener's Ex. 20 (Final Decree—Art. 10.)

To which ruling of the Master the defendant then and there duly excepted.

Mr. Murphy: Will it be admitted that neither the receivers nor anybody else scheduled the claims of E. B. Spiller against the railroad company or E. B. Spiller, et al. against the railroad company?

Mr. Miller: Who do you mean by "anybody else"?

Mr. Murphy: Well, the railroad company or anybody else in interest. I am not sure whether that order was directed to the receivers alone or not.

[fol. 508] Mr. Miller: Scheduled where?

Mr. Murphy: In these cases—scheduled the claims in the receivership cases.

Mr. Miller: I don't admit that because I don't know what is contained in the schedule, and you couldn't ask me to admit that, because I don't know.

Mr. Murphy: Does that schedule appear in those printed volumes?

Mr. Miller: We will see if we can get that list of claims and examine it, and if it does not contain these claims that are here we will admit it in the record.

Mr. Murphy: That is all right.

Mr. Cowan: Our examination of the record fails to discover that there are claims listed in any schedule of liabilities at all. I am sure of that.

Witness testified that Mr. Deatherage was associated with him in this litigation from the time it was instituted in the Federal Court; he had a contract with Mr. Deatherage to handle these cases; Mr. Deatherage died about January 22, 1921. (p. 40.)

Cross-examination.

By Mr. Miller:

Witness testified that Mr. Deatherage, who was a practicing lawyer in Kansas City, with an extensive practice, lived there at least twenty years. The two suits filed by Mr. Spiller in the Federal Court at St. Louis, were for the purpose of preventing the statute of limitations running on the claim, there being some uncertainty as to service.

Witness testified that he handled these claims before the Interstate Commerce Commission; when the claims were originally filed he had it worked out by the car number. point of origin, point of destination, and the figures made upon the basis of the minimum carload weight, at three cents per hundred pounds, whatever that was, the difference in the rate on that weight, for each of these shippers. The first of the detailed statements was filed in June, 1907, before the lapse of one year next after the passage of the Hepburn bill, which allowed one year after the passage of that act. (P. 41.) The act was suspended by a joint resolution and carried over until the latter part of August, but the statements were filed within a year after the passage [fol. 509] of the act. The judgment at Kansas City covered all claims where the shipment was made on or after August 29, 1906, and covered some claims that were in that case before the Interstate Commerce Commission. The schedule took only the claims that had been checked by the rail road as being correct. There are claims which were not checked before the findings of the Commission. All the claims that he presented at that time which were checked were embraced in a suit at Kansas City. Then claims were filed since, up to November, 1908. All the claims that were embraced in the judgment in those cases in the Kansas City District Court, were all filed by the shippers within the period as provided by law, a two-year period, and these claims covered shipments which moved between the latter part of August, 1906, and November 17, 1908. (P. 42.)

Witness testified that he did not appeal for Mr. Spiller and the other claimants from the final decree in the Frisco Receivership cases, or from the order confirming the sale, or from any of the orders made in the Frisco Receiver-

ship cases at St. Louis, because they were not parties and

had no right in that case. (P. 43.)

The attention of the witness was directed to the fifth line from the bottom the first page of the notice which had been identified, and the witness was asked whether the words that are blurred—"and used by"—in that line, were in the notice as served. The witness replied that he presumed so, he did not know, it would not be material. They had a judgment for the moneys that the railroad company had collected.

# Mr. Murphy:

Q. And you intended to assert that as a prior right in securing the claims of the interveners?

A. It ought to be in the notice.

Mr. Miller: Well, the notice will speak for itself. That is all, Judge. (P. 43.)

E. B. Spiller, being duly sworn, testified on behalf of the interveners, as follows:

Direct examination.

# By Mr. Murphy:

Witness testified that he is the Secretary of the Cattle Raisers' Association of Texas, and the plaintiff in cause No. 4308 in the District Court at Kansas City, and one of the plaintiffs in cause No. 4320 in said Court. The other parties [fol. 510] who are named as plaintiffs in case No. 4320, had nothing to do with the litigation.

Q. Mr. Spiller, was any notice of any kind ever served on you, or communicated to you by anyone that the District Court of the United States, for the Eastern Division of the Eastern District of Missouri, had made an order fixing the time within which claims against the St. Louis & San Francisco Railroad Company could be filed, or be barred!

Mr. Miller: I object to that because the final decree recites that notice has been given to all parties who could have any claims.

The Master: Overruled. Taken subject to objection.

To which ruling of the Master, defendant by counsel then and there duly excepted and still except. (p. 44.)

A. No, sir.

## [fol. 511] IN UNITED STATES DISTRICT COURT

[Title omitted]

### No. 4174

REPORT OF SPECIAL MASTER ON RECEIVERS' FIRST BI-MONTHLY REPORT

I respectfully report as follows:

The Receivers in the above entitled cause, under the authority and requirements of the order of their appointment filed herein on May 27th, 1913, have filed in the office of the Master, herein, their first bi-monthly report of their administration of the trust committed to them, which report covers their operations, as Receivers, for the period from May 28th to June 30th, both inclusive, 1913.

I have, with the assistance of a competent accountant, examined the report, which is hereto annexed, together with [fol. 512] the accounts and business of the said Receivers for the period named, as the same are recorded and found in the books, statements and vouchers of said Receivers, and I find the statement of cash receipts and disbursements contained in said report to be true and correct, as therein stated, with the following exception:

The Receivers have included in the said report the amount of \$603,849.96, as having been turned over to them by St. Louis and San Francisco Railroad Company, at the close

of business on May 27th, 1913.

In this connection, I find that the following amounts, forming a part of said \$603,849.96, were not, in fact, received by the Receivers, but were retained by certain banks and trust companies, herein named, where they were on deposit, and by such depositaries were applied on account of loans made by such depositaries to the St. Louis and San Francisco Railroad Company. At the close of busi-

ness on May 27th, 1913, the following amounts were on deposit to the credit of St. Louis and San Francisco Railroad Company with the following depositaries, and were by them appropriated upon the respective debts of said Railroad Company owing them:

National City Bank of New York Equitable Trust Co. of New York	\$5,858.96 33,537.37
Louis	100,566.67 55,197.78 49,477.49 24,908.35
Total	\$269,546.62

I have been informed by the Receivers herein, that the books and accounts of the Receivers have been adjusted [fol. 513] since June 30th, 1913, to show the facts as above stated, and that such adjustment will appear in their second bi-monthly report.

The total receipts for the period covered by this report, which actually have come into the

hands of the Receivers were \$5,569,785 85 Less the amount shown above as retained by depositaries 269,546 62

The total disbursements were	4,935,942.13
The balance of receipts over disbursements	

\$364,297.10

In my examinations all vouchers covering payments have been examined by me, or my accountants, with the exception of the pay checks, which amount to upwards of forty thousand in number. As to these, I have checked up to the total pay checks paid, each day, with the machine lists in the Auditor's office, and which agreed with such payments as shown by the cash book.

In this connection, I have thought it best to call the Court's attention to the following items of payments, which have been made by the Receivers, since their appointment,

over sixty per cent in number of the payments having been made on May 28th, 1913, which was the first day of their receivership, and before they had seen, or were made acquainted with, the full meaning of the order of the Court. The payments were made in perfect good faith, and the facts are mentioned by me, not to in any way criticise any one, but to make full report of the facts covering the trust, as I find them to be:

[fol. 514] Statement Showing Payments Made by the Receivers from May 28 to June 30, Both Inclusive, 1913, for Which There is Not Yet Any Order of the Court

Loss and Damage:	Obligations incurred during six months from Nov. 28, 1912, to May 27, 1913, in- clusive, and paid without order of court since the receivership	Obligations incurred prior to Nov. 28, 1912, and order of court paid without
Freight		\$6.00
Stock	\$273.78	105.00
Property	50.34	364.99
Delay to baggage	5.00	
Detouring train—wreck	50.00	
Fires set out	10.00	
Injuries to Individuals	1,462.40	
Materials and Supplies	4,146.10	
Fuel	1,201 77	
Material and Labor on		
Buildings	2,662 20	
Rents of Offices, Telephones,		
etc.	80 50	
Repairs to Equipment		223.03
Turning Engines	13.00	
Expenses Joint Facilities	315.17	10111
Use of other tracks	535.60	

### Statements Showing Payments Made-Continued

Fees:	Obligations incurred during six months from Nov. 28, 1912, to May 27, 1913, inclusive, and paid since the receivership without order of court	Obligations incurred prior to Nov. 28, 1912, and paid without order of court
For taking depositions.	36.30	
Recording deeds	2.90	
Protest fees	2.65	
Professional services of P. L. Williams, Attor-		
ney	50.00	
Unclaimed wages		15.75
Pay Drafts		609.18
Amount remitted for interest due July 1, 1913, on account of Chester, Perryville & Ste. Genevieve Ry. Co. 1st		
Mortgage 5% Bonds	700.00	8007.034
	\$11,597.71	\$1,323.95
Total	\$	12,921.66

I further respectfully report to the Court that on page 4 of my report, dated June 26th, 1913, on the Receivers' Peti-[fol. 515] tion No. 8, filed June 30th, 1913, I recommended that the Receivers be given leave to apply the moneys in their hands towards the discharge of the interest falling due July 1, 1913, upon the Refunding and Underlying Mortgages, and included in my said report was an item of "\$112.00" (see page 3, of Petition No. 8, printed copy). for payment of interest on the Southern Missouri and Arkansas Railroad five per cent bonds, and an item of \$135,-100.00 (see page 4, of Receivers' Petition No. 8), for payment of rental, which is represented by interest on the Kansas City, Fort Scott and Memphis Preferred Stock Trust Certificates, both due on July 1, 1913. The item of "\$112.00" appearing on page 3 of the Receivers' said Petition No. 8, should be \$112.50. The said item of \$135,100.00" should have been \$150,000.00. I find and, therefore, report that the Receivers, when making their remittances and payments for the interest due July 1, 1913, upon the Refunding

and Underlying Mortgages, pursuant to your order of June 27th, 1913 (No. 8), remitted the full amount of \$112.50, then due on the Southern Missouri and Arkansas bonds, and the full amount of \$150,000.00 then due on the Kansas City, Fort Scott and Memphis Preferred Stock Trust Certificates. The petition of the Receivers which was filed June 30th, 1913, top of page 6, correctly states the amount of the Kansas City, Fort Scott and Memphis Preferred Stock Certificates at \$150,000.00, as the Court will see, but upon page 4 of their said petition, this item is incorrectly stated by them, at \$135,100.00. The Court, in its order of June 27, 1913, following the figures given in the petition of the Receivers, in fixing what sums should be paid by them, adopts the erroneous sum of \$135,100.00 (see page 3, Order No. 8), instead of the correct sum of \$150,000.00.

[fol. 516] I further report that the Receivers herein, on June 18th, 1913, settled a judgment obtained by J. L. Driver et al., vs. St. Louis and San Francisco Railroad Company, in Tennessee, which judgment, with costs, amounted to That said judgment was paid upon the advice of the Receiver's counsel in order to protect the trust. This item of expense arose from a claimed breach of covenant by which St. Louis and San Francisco Railroad Company, in accepting a deed to a parcel of land at Osceola, Arkansas, for purpose of erecting a station thereon, agreed not to move said station more than a certain distance from said location. That the said Railroad Company did later move said station further than allowed by the deed, but before doing so it was given a bond to protect the said Railroad Company from any damages claimed and collected therefor, and said bond is alive at present. Driver et al., prior to the filing of ancillary proceedings in the Federal Court at Memphis, Tennessee, by the complainant herein, sought the appointment of a separate Receiver for the property of St. Louis and San Francisco Railroad Company in the State of Tennessee, and it was to prevent such, and to properly protect the property of said Company committed by this Court to the care of the Receivers herein, that said judgment of \$4,355.36 was paid by your Receivers, as herein stated.

I desire further to report that upon examination of the printed record in this cause, I find that in the printing of the Receivers' Petition No. 8, filed June 30, 1913, there has been omitted from page 5 thereof the following interest obligation due on September 1, 1913, which was included in the original petition on file in this Court:

[fol. 517] "Kansas City, Memphis & Birmingham General

4% Bonds, \$66,460.00.

These bonds are secured by first mortgage on the Kansas City, Memphis & Birmingham Railroad, in possession of Receivers. This is a rental which the defendant Railroad Company is obligated to pay under its lease of said railroad."

I further report that the Receivers in their Petition No. 8, top of page 7, printed copy, thereof, state the amount of the bonded obligations due in October, 1913, at \$2,280,000.00 of the Ozark and Cherokee Central Railroad five per cent bonds, then outstanding, instead of \$2.880,000,00, which I find to be the fact. This was, however, a harmless error, as no interest on this item will fall due until October 1. 1913, and consequently nothing has been paid out on this item of \$2,880,000.00, in the sums disbursed under your order of June 27th, 1913.

Further reporting, I find that, with the correction of the errors hereinabove referred to, as to the amounts of interest due July 1, 1913, as stated in the Receivers' said Petition No. 8, the total amount of interest that became due and was payable on July 1, 1913, on the outstanding 4% Refunding Bonds and Underlying Bonds thereof, was \$1,876,177.50, instead of \$1,861,277.00 as shown near the foot of page 2 of said petition, and near the foot of page 2 of my report thereon; and as shown at the middle of page 2 of the order of the Court thereon.

All of which is respectfully submitted.

Thomas T. Fauntleroy, Special Master.

July 29th, 1913.

## [fol.518] Thos. H. West and B. L. Winchell, Receivers St. Louis and San Francisco Railroad

Report of Receipts and Disbursements for the Period May 28th to 31st, 1913, and month of June, 1913

J						

	and a column		
	Accrued prior to appoint- ment of re- ceivers and collected un- der receiver- ship	Accrued and collected un- der receiver- ship	Total
Balance of Cash, May 27, 191; Station Agents and Conduc- tors—on freight and pas-	4	<b>*</b>	\$603,849,96
senger business Railroad Companies —on traffic	. 910.189.17	2.873,77,8.48	3,783,967,65
and car service balances Companies and Individuals—	395,374,21	4.377.15	399,751,36
on claims and bills rendered. United States Post Office Dep't		37,511.45	265.955,90
—for mail service United States Express Co.—	67,528,74	8.964.98	76,493,72
for express service From Receivers' Temporary	39,767,26	*******	39,767.26
Loans	*******	400,000,00	400,000,00
Total Receipts	\$2,245,153.79	\$3,324,632.06	\$5,569,785.85
[fols, 519 & 520]	Disbursements		
	Accrued prior		
	to appoint-	Accrued	
	ment of	under the	
	receivers	receivership	Total
Station Agents-for back			
charges on freight Railroad Companies—on traffic	\$146,625,34	\$188,997.96	\$195,623,30
and car service balances Companies and Individuals	396,286,58	32,754,63	429,041,21
on miscellaneous accounts	38,319,80	23,306.71	61.626.51
Pay Rolls	1,302,410,87	218.606.65	1.521.017.52
Material and Simplies.	3,976.03	105,124,69	109,100.72
Taxes	584,526,58	628.79	585,155.37
interest Coupons.	1.419,427.43	324,950.07	1.744,377,50
Interest Renfal.	93.548.39	56,451.61	150,000.00
Loans Paid Off	*******	*********	1.40,5440.(K)
Equipment Trust Obligations.	*******		********
Total Disbursements		\$950,821.11	\$4,935,942,13
Cash Balance June 30th, 1913			
	*********	*********	\$633,843,72

#### Recapitulation

Receipts:	Railroad Co., acct. prior to May 28, 1913	Receivers	Total
May 28, 1913, to date	\$2.245,153.79	\$3,324,632.06	\$5,569,785.85
Disbursements: May 28, 1913, to date	3,985,121.02	950.821.11	4,935,942,13
Balance		\$2,373,810,95	\$633,843.72
Respectfully submitted. Receivers.	Thos. H. W	est, Benjamin	1 Winchell,
Received July 9 1913. T. T.	F Sp M		

## [fol. 521] IN UNITED STATES DISTRICT COURT

## [Title omitted]

### No. 4174

REPORT OF SPECIAL MASTER ON RECEIVERS' SECOND BI-MONTHLY REPORT

## I respectfully report as follows:

The Receivers in the above entitled cause, under the authority and requirements of the order of their appointment filed herein on May 27th, 1913, have filed in the office of the Master herein, their second bi-monthly report of their administration of the trust committed to them, which report covers their operations as Receivers, for the period from July 1st to August 31st, both inclusive, 1913.

I have examined the report, which is hereto annexed, together with the accounts and business of the said Receivers for the period named, as the same are recorded and found in the books, statements, vouchers and correspondence of said Receivers, and I find the statement of cash receipts and [fol. 522] disbursements contained in said report to be true and correct as therein stated.

The method of examination of all vouchers by myself, or my accountant, has been the same as obtained in the examination of the Receivers' first bi-monthly report, as shown on page three of my report thereon, filed herein July 30th, 1913.

Without intending to make any adverse criticism of certain payments made by the Receivers in perfect good faith. but for which no order of this Honorable Court has vet been made, the Court's attention is called to the following amounts paid by the Receivers during the period covered by this report, all of which, excepting three items shown herein, accrued within six months of May 28th, 1913, the date when this receivership began:

Nine Claims for loss and damage to baggage, etc., all of which accrued within six months of the re- ceivership, excepting one item of \$4.25	\$93.00
Paid Missouri Pacific Railway Company the pro- portion due by the defendant Railroad Company as the cost of operating the joint interlocking plant at Williamsville, Missouri, during August,	
1912, under a contract with said Missouri Pacific	20. 40
Railway Company Paid for damage to stock on the right of way in-	59.43
curred May 2nd, 1913	50.00
Paid to Cash Lawhead, Clerk of Circuit Court of Howell County, Missouri, in satisfaction of judg-	
ment	844.25

This judgment was paid in the case of C. E. Geary v. St. Louis and San Francisco Railroad Company for injuries [fol. 523] received by Geary on the 11th of October, 1911, while waiting for a train at the defendant's station in the

Town of Pomona, in said County of Howell.

Judgment was rendered against the defendant, on the trial of the case, for \$2,750.00 and costs. The case was appealed to the Springfield Court of Appeals, the appeal bond being signed by the defendant and its district attorney, W. J. Orr, without any consideration passing to Mr. Orr, Lat wholly to protect the property of the Railroad Company and to save it from being levied upon and sold by the Sheriff to satisfy the amount of the judgment.

Upon appeal, the judgment was affirmed for \$750.00 and costs. The appeal of the case and the execution of the bond by the surety redounded to the benefit of the Railroad Company in the sum of \$2,000.00. If the appeal bond had not been so executed the defendant would have been compelled to pay the whole amount of said judgment, to-wit

\$2,750.00, and costs, in order to prevent its property from

being levied upon and sold.

In addition to the above items, the Receivers have, during the period covered by this report, made certain small pay. ments for which no orders have thus far been issued, which payments aggregate about \$500.00 and represent a reimbursement of agents' accounts for items paid by agents, mainly for loss and damage to stock on the right of way, incurred within two or three months of the appointment of these Receivers, and the drafts representing which payments were not presented until after June 30th, 1913.

All of which is respectfully submitted.

Thos. T. Fauntleroy, Special Master.

St. Louis Mo., September 27th, 1913.

[fol. 524] St. Louis and San Francisco Railroad—Thos, H. West, W. C. Nixon and W. B. Biddle, Receivers

Report of receipts and disbursements for the months of July and August, 1913

#### Receipts

	Accrued prior to appoint- ment of re- ceivers and collected un- der receiver- ship	Accrued and	Total
Balance of Cash, June 30, 1913 Station Agents and Conductors,			\$633,843.72
on Frt. and Pass. Business	\$77 611 70	\$7.022.617.04	7.100,258,80
Railroad Companies, on Traffic and Car Serv. Balances	900 059 94	613,953,36	913,907.20
Companies and Individuals, on Claims and Bills rendered	226,302.94	445,696.75	671,999.69
United States Post Office Dep't, for Mail Service.	5,568,82	134,661.73	140,230,55
United States Express Co., for Express Service.	97,357,32	231,430,52	328,787.84
Total Receipts		\$8,448,359,40	\$9,789,027.80

Disbursements

11015: 020 (6 520)	Sustain se memes		
1	Accrued prior to appointment of receivers	Accrued under the receivership	Total
Station Agents, for Back Charges on Freight Railroad Companies, on Traffic	\$20,237.68	\$526,254.71	\$546,492,39
and Car Service Balances Companies and Individuals, on	191,198.71	495,457.48	686,656.19
Miscellaneous Accounts	207,326,02	552,750,76	760,070,78
Pay Rolls	78.446.49	2,792,613,12	2,871,059,61
Material and Supplies	(a) 9,686,93	1,004,142,74	1.013,829.67
Taxes	682.10	45,811.09	46,493.19
Interest Coupon	220,354,29	244,240,71	464,595.00
Loans paid off		400,000,00	400,000.00
Equipment Trust Obligations		773,442.32	773,442,32
Bank Balances applied on loans,	257,473.05		257,473.05
Sinking Funds	2,990.00	1,610,00	4,600.00
Total Disbursements	\$988,395.27	\$6,836,322.93	\$7.824,718.20
Cash Balance August 31, 1913.			\$1,964,309.60

<sup>(</sup>a) This was not, in fact, an actual cash disbursement, but an offset settlement with the Paris & Great Northern R. R. Co., an auxiliary line owned by the Frisco,

Respectfully submitted, Thomas H. West, W. C. Nixon, W. B. Biddle, Receivers.

September 6, 1913.

# [fol. 527] IN UNITED STATES DISTRICT COURT

# [Title omitted]

## No. 4174

I respectfully report as follows:

The Receivers in the above entitled cause, under the authority and requirements of the order of their appointment filed herein on May 27th, 1913, have filed in the office of the Master herein, their third bi-monthly report of their administration of the trust committed to them, which report covers their operations, as Receivers, for the period from September 1st to October 31st, both inclusive, 1913.

I have examined the report, which is hereto annexed and made a part hereof, together with the accounts and business of said Receivers for the period stated, as the same are recorded in the books, statements, vouchers and correspondence of said Receivers, and I find that the statement of cash receipts and disbursements contained in said

report is true and correct as therein stated.

The method of examination of all vouchers by myself, or my accountant, has been the same as obtained in the examination of the Receivers' first bi-monthly report, as shown on page three of my report thereon, filed herein July 30th, 1913.

All of which is respectfully submitted.

(Signed) Thomas T. Fauntleroy, Special Master.

St. Louis, Missouri, December 8, 1913.

St. Louis and San Francisco Railroad—Thos. H. West, W. C. Nixon, W. B. Biddle, Receivers

Report of Receipts and Disbursements for the months of September and October 1913

### Receipts

[fol. 528] Balance of Cash Aug.	Accrued prior to appoint- ment of re- ceivers and collected un- der receiver- ship	Accrued and collected un- der receiver- ship	Total
31, 1913 Station Agts, & Condrs,—on			\$1,964,309,60
frt. & pass. business	\$23,271,41	\$7,696,378.06	7,719,649,47
Railroad Companies—on traf. & car serv. balances	50,308,90	842,135,20	892.444,10
Companies & Individuals—on claims & bills rendered	405,054.21	654.005.14	1.059,059.35
United States Post Office Dep'tfor mail service	668,69	145,529.08	146,197.77
United States Express Co.—for express—service		128,022.52	128,022.52
Total Receipts	\$479,303.21	\$9,466,070.00	\$11,909,682.81

### Disbursements

	Accrued prior		
	to appoint- ment of	Accrued under the	
America Con Inches	receivers	receivership	Total
Station Agents—for back charges on freight Railroad Companies—on traf.	\$6,284,62	\$622,939.40	\$629,224.02
& Car Serv. balances	45,053,88	722,239,80	767,293,68
Companies & Individuals—on		~~~ ~~~ ~~	
miscellaneous accounts		702,997.29	1.248,475.00
Pay rolls		3,079,321.24	3.089,031.35
Material & Supplies		1.658,783.39	1.658,783,39
Taxes	19.586, 25	34.045.78	53,632.03
Interest Coupons	658,675.39	2,408,128,61	3,066,804,00
Loans paid off		*******	
Equip. Trust Obligations-			
Frisco Construction Co		150,019.74	150,019.74
Equipment Trust Obligations.		400,006,02	400,006.02
Interest Rental		150,000,00	150,000.00
Sinking Funds	9,059,13	6,190.87	15,250,00
Total Disbursements	\$1,293,847.09	\$9,934,672.14	\$11,228,519.23
Cash Balance Oct. 31, 1913			\$681.163.58

Respectfully submitted, (Signed) Thos. H. West, W. C. Nixon, W. B. Biddle, Receivers,

## Mr. Murphy:

Q. Did you ever have any knowledge that any such order had been made?

To which question, counsel for defendant made the same objection, which objection was by the Special Master, overruled.

[fols. 529 & 530] To which ruling of the Special Master, defendant, by counsel, then and there duly excepted and still except. (P. 44.)

# A. No, sir.

Counsel for interveners offered in evidence the bi-monthly reports made by the Receivers in this case, the receivership of the St. Louis & San Francisco Railroad Company, and the bi-monthly reports made by the receivers at the instance of the complainant, North American Company, general creditor, and the receivers of the Consolidated Cause, after the bills of foreclosure were filed, said receivers' bi-monthly reports being those filed between May 27, 1913, and May

24, 1914, the period covering the filing of the creditors' bill and the foreclosure proceedings under the mortgages, and those filed under date of Jan. 25, 1917.

Mr. Miller: All that will be admitted, subject to my general objection.

The Master: That will be the order (p. 47).

Said bi-monthly reports, as above referred to, are in words and figures as follows, to-wit:

[fol. 531] IN UNITED STATES DISTRICT COURT

# [Title omitted]

REPORT OF SPECIAL MASTER ON RECEIVERS' FOURTH BI-MONTHLY REPORT

The Receivers in the above entitled cause, under the authority and requirements of the order of their appointment, filed herein on May 27, 1913, having filed in the office of the Master herein their Fourth Bi-monthly Report of their administration of the trust committed to them, which report covers their operations as Receivers for the period from November 1st to December 31st, both inclusive, 1913, I respectfully report as follows:

I have examined the report, which is hereto annexed and made a part hereof, together with the accounts and business of the Receivers for the period covered, as the same are recorded and shown in the books, statements, vouchers [fol. 532] and correspondence of said Receivers, and I find that the statement of cash receipts and disbursements contained in said report is true and correct as therein stated, with the following exceptions:

The item of \$12,000, referred to in the foot-note to the Receivers' Report, has not been included and shown in the Receivers' cash book, either among the receipts or disbursements, it having been made the subject of a journal entry.

I find the facts relating to this item of \$12,000 to be as follows:

Prior to March 30, 1912, the St. Louis and San Francisco Railroad Company had advanced to Isaac T. Cook, Esq., at various times, amounts aggregating \$29,715.00, to purchase sub-leases on certain lots at Joplin, Missouri, whereon it was desired to erect an office building to be used also as a passenger station for the Frisco at that place. By an agreement dated May 24, 1912, between said Cook and W. C. Nixon, Esq., then Vice-President of the St. Louis and San Francisco Railroad Company, it was provided that when said building was completed and accepted by the Frisco said Cook was to repay the amount thus advanced, which, with interest to March 30, 1912, amounted to \$31,-685.55, together with interest on this last named amount from April 1, 1912, to the date when said building was completed and accepted by the Frisco, and that such payment was to be made as follows:

By said Cook delivering his receipt for \$12,000, the amount agreed upon as his compensation for services in securing the 99-year leasehold estate on the lots of ground and sub-leases thereto and for erecting said building and leasing it to the Frisco; the balance of the amount to be [fol. 533] paid either in cash or in his promissory note due on or before two years from its date, with interest at 6%, and with certain securities agreed upon and therein named as collateral.

I further find that the terms of said agreement between said Cook and W. C. Nixon, Esq., as Vice-President, have been carried out by the delivery to the Receivers herein on or about December 19, 1913, of said Cook's receipt for \$12,000 for services and of his two years' note dated September 1, 1913, for the balance, or \$22,378.81, and of the agreed collateral thereto, which note includes interest to September 1, 1913, the date of the acceptance of said building.

I further find that among the assets taken over by the Receivers herein, as shown in their inventory filed herein September 27, 1913, with my report thereon, there is an item under "Cash advances account working funds" (see pages 11 and 12 thereof) entitled "I. T. Cook \$29,715.00," and that this represented the amount due from said Cook on said account on March 30th, 1912.

I further find that said amount of \$12,000 hereinabove referred to represented, in effect, a partial payment by said Cook on account of his obligation to the St. Louis and San Francisco Railroad Company and its Receivers of \$29,715

and interest thereon, and that it ought to have been included in the cash receipts of the Receivers as the same are shown in their cash book.

I also find that the amount of \$12,000 referred to above as compensation for the services of said Cook represented in effect, a cash payment made to him by the Receivers herein for such services in accordance with the agreement of May 24, 1912, between said Cook and said W. C. Nixon, Jfol. 534] as Vice President, and that said amount ought to have been included in the disbursements on the Receivers' chash book on the same date as said item of \$12,000 should

have been shown in the cash receipts.

I further find that said amount of \$12,000 did not become due under said agreement between said Cook and said Nixon, as Vice-President, and was not due, until Sentember 1, 1913, the date of the completion and acceptance of said building, and that therefore it was not an obligation of the St. Louis and San Francisco Railroad Company which accrued prior to the receivership herein, but became an obligation of the Receivers herein under the original order of their appointment, being a necessary expense of operating the railroads and conducting the business during their receivership. In view of this finding I think it best to call the Court's attention to the fact that in the receipt for the \$12,000 signed by said Isaac T. Cook under date of December 19, 1913, he acknowledges receipt from the St. Louis and San Francisco Railroad Company, prior to May 27, 1913, of said amount. While the method adopted in accounting for this transaction did not in any way affect the Receivers' cash balance, the matter is referred to herein not with a desire to criticise anyone, but to fully report the facts covering the trust, as I find them to be.

Respectfully submitted, Thomas T. Fauntlerey,

Special Master.

St. Louis, Missouri, February 25, 1914.

[fol. 535] St. Louis and San Francisco Railroad-James W. Lusk, W. C. Nixon, W. B. Biddle, Receivers

Report of Receipts and Disbursements for the months of November and December, 1913

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	Accrued prior		
	to appoint-		
	ment of		
	Receivers	Accrued	
	and col-	and col-	
	lected under	lected under	
	Receivership.	Receivership.	Total
Balance of Cash Oct. 31, 1913. Station Agents and Conductors —On freight and passenger			\$681,163.58
business	*******	\$7,412,000.08	7.412,000.08
fic and car service balances. Companies and Individuals—	\$161,309.47	1,086,318.02	1.247,627,49
On claims and bills rendered. United States Post Office	660,474.16*	1,145,170,79	1,805,644,95
Dept.—For mail service United States Express Co.—	5,00	184,738,49	184,743,49
For express service	*******	$222,\!318.68$	222,318,68
Total Receipts	\$821,788.63	\$10,050,546.06	\$11,553,498,27
[fol. 536]	Disbursements		
	Accrued		
	prior to	Accrued	
	appointment	under the	
	of Receivers.	Receivership.	Total
Station Agents-For back			
charges on freight Railroad Companies—On traffic		\$754,589.62	\$754,589,62
and car service balances Companies and Individuals—On	1	684,718.06	729,004.94
miscellaneous accounts		1,098,115,84*	1,695,617.94
Pay rolls	5,669,05		3.172,795,18
Material and Supplies		1,533,821,46	1,533,821,46
Taxes	640.492.85		1,042,231.19
Interest coupons	2.546.25		629,207,50
Loans paid off		***********	***********
Equipment Trust Obligations.		26 449 20	36,442,32
Interest Rental		150,000.00	150,000.00
Total Disbursements	\$1.200.407.10	88 459 919 on	20 740 710
Cash Balance Dec. 31st, 1913	\$1,000, Ter( . 10)	95,466,216,02	\$9,743,710,15
		**********	\$1,800,788,12

<sup>\*</sup>Includes \$12,000 receipted voucher in favor of Isaac T. Cook, for services, same amount included in item "Companies and Individuals on Claims and Bills rendered," being in part liquidation of hs account.

Respectfully submitted, J. W. Lusk, W. C. Nixon, W. B. Biddle,

Receivers.

[fol. 537] IN UNITED STATES DISTRICT COURT

# [Title omitted]

REPORT OF SPECIAL MASTER ON RECEIVERS' FIFTH BI-MONTHY REPORT

The Receivers in the above entitled cause, under the authority and requirements of the order of their appointment, filed herein on May 27, 1913, having filed in the office of the Master herein their Fifth Bi-Monthly Report of their administration of the trust committed to them, which report covers their operations as Receivers for the period from January 1st to February 28th, both inclusive, 1914, I respectfully report as follows:

I have examined the report, which is hereto annexed and made a part hereof, as well as the accounts and business of the Receivers for the period stated, as the same are recorded and shown in the books, statements, vouchers and correspondence of the Receivers, and I find that the state-[fol. 538] ment of cash receipts and disbursements shown in said report is true and correct as therein stated, with the following exceptions:

Two vouchers—one in favor of the Arkansas Grocery Company for \$11.39, and the other in favor of the Missouri Public Utilities Company for \$49.52—were returned to the Receivers and are still held by them pending the adjustment of questions which have arisen as to the amount due to the respective parties.

The Court's attention is respectfully called to the fact that during the period covered by this Report there were paid two certain judgments and costs—one amounting to \$51.65, and the other to \$53.15—on suits brought to recover damages for ejectment from a train on August 4, 1912, no order covering which has yet been made by this Court.

Respectfully submitted, Thomas T. Fauntleroy, Special Master.

St. Louis Mo., April 16, 1914.

[fol. 539] St. Louis and San Francisco Railroad—Jas. W. Lusk, W. C. Nixon, W. B. Biddle, Receivers

Report of Receipts and Disbursements for the Months of January and February, 1914

	eordary, 131	•	
	Receipts		
	Accrued prior to appoint-		
	ment of re-		
	ceivers and	Accrued and	
	collected un-	collected un-	
	der receiver-		
	ship	ship	Total
Balance of Cash Dec. 31, 1913 Station Agents and Conductors —on freight and passenger			\$1,809,788.12
business		86,535,302.24	6,535,302.24
and car service balances Companies and Individuals—		780,458.00	852,706.77
on claims and bills rendered. United States Post Office De-		1.078,123.87	1.592.812,66
partment—for mail service. United States Express Co.—		146,545.55	146,545,55
for express service		222,200,91	222,200,91
Receivers' Certificates	**********	2,410,650.00	2,410,650,00
Bonds sold (collateral)	14,199,06		14,199,06
Total Receipts	\$601,136,62	\$11,173,280.57	\$13,584,205.31
[fol. 540]	Disbursemen	its	
	Accrued		
	prior to	Accrued	
	appointment		
Station American	of Receivers.	Receivership.	Total
Station Agents—for back charges on freight		*****	
Railroad Companies—on traffic	\$	\$666,308.87	\$666,308,87
and car service balances Companies and Individuals	49,726.16	474,739,12	524,465.28
on miscellaneous accounts	536,415.11	1.177,478,23	1.713,893.34
Pay rolls	1,531.98	3,234,801,53	3,236,333.51
Material and Supplies	2.249,157.36	1,603,660,69	3.852.818.05
Talxes	29,498.70	17,856,77	47,355,47
interest Coupons		1,383,660,00	1,383,660,00
Loans paid off		********	1,3783,0007.00
Equipment Trust Obligations Equipment Trust Obligations —Frisco Construction Com-	*******	782,436,30	782,436,30
lany		101 595 00	101
Sinking Funds			
Dank Balances applied on		1,000,00	4,000,00
	53,623.63		53,623.63
		\$9,537,366.51	\$12,457,319.45
Cash Balance February 28th, 19	14		\$1,126,885,86
Sinking Funds Bank Balances applied on loans  Total Disbursements\$  Cash Balance February 28th, 19	2,919,952.94		

James W. Lusk, W. C. Nixon, W. B. Biddle, Receivers

# [fol. 541] IN UNITED STATES DISTRICT COURT

# [Title omitted]

REPORT OF SPECIAL MASTER ON RECEIVERS' SIXTH BI-MONTHY REPORT

The Receivers in the above entitled cause, under the authority and requirements of the order of their appointment, filed herein on May 27, 1913, having filed in the office of the Master herein their Sixth Bi-Monthly Report of their administration of the trust committed to them, which report covers their operations as Receivers for the period from March 1st to April 30th, both inclusive, 1914, I respectfully reports as follows:

I have examined the report, which is hereto annexed and made a part hereof, as well as the accounts and business of the Receivers for the period stated, as the same are recorded and shown in the books, statement, vouchers and correspondence of the Receivers, and I find that the state-[fol. 542] ment of cash receipts and disbursements shown in said report is true and correct as therein stated.

Thomas T. Fauntleroy, Special Master.

St. Louis, Missouri, September 30, 1914.

[fol. 543] St. Louis and San Francisco Railroad—James W. Lusk, W. C. Nixon, W. B. Biddle, Receivers

Report of Receipts and Disbursements for the months of March and April, 1914

	Receipts		
	Accrued prior to appoint- ment of re- ceivers & collected un- der receiver- ship	Accrued and collected un- der receiver- ship	Total
Balance of Cash Feby. 28, 1914			\$1,126,885,86
Station Agents and Conductors  On frt. and pass, business Railroad Companies—On traf. & car serv. balances	\$ 95,716.87	\$6,622,354.19 668,764.50	6,622,354,19
Companies & Individuals—On claims and bills rendered United States Post Office De-	252,937.50	1.141,328,66	1,394,266,16
partment—For mail service United States Express Co.—	********	167,511.10	167,511.10
For express service		128,022,52	128,022,52
Receivers' Certificates		562,175.00	562,175.00
Total Receipts	\$348,654.37	\$9,290,155.97	\$10,765,696.20

1			
	Accrued prior to appointment	Accrued under the	
	of Receivers.	Receivership.	Total
Station Agents-For back			
charges on freight Railroad Companies—On traf.	\$	\$575,873.86	\$575,873.86
and car service balances	32,332,79	725,784.84	758,117.63
Companies & Individuals—On			
misel, accounts	303,251.67	1,179,637.73	1,482,889.40
Pay rolls	1.754.21	3,186,132.05	3.187.886.26
Material and supplies	61,892.23	1,497,461.86	1,559,354.09
Taxes	102,821.37	156,287.33	259,108.70
Interest coupons	233.87	1,272,988,63	1,273,222.50
Loans paid off			******
Equipment Trust Obligations		365,006.02	365,006.02
Interest Rental		150,000,00	150,000.00
Equipment Trust Obligations			
-Frisco Construction Co		163,625.00	163,625.00
Total Disbursements	\$502,286.14	\$9,272,797.32	\$9,775,083.46
Cash Balance April 30, 1914			\$990,612.74

James W. Lusk, W. C. Nixon, W. B. Biddle, Receivers,

## [fol. 545] IN UNITED STATES DISTRICT COURT

# [Title omitted]

# FINAL REPORT OF RECEIVERS

Come now James W. Lusk and William B. Biddle, Receivers in the above entitled cause, and respectfully report that on November 1, 1916, they and their co-Receiver. William C. Nixon, now deceased, paid over and transferred to St. Louis-San Francisco Railway Company, the purchaser of the railroad of the defendant in the above entitled cause, under and in accordance with the final decree entered herein, the sum of \$6,233,352.35, said sum being all funds in their hands at the time of said payment and the cash balance on hand on October 31, 1916, as shown by their report as of that date filed herein, which report was duly approved by the Special Master herein on January 16, 1917; and that at the time of said payment said St. Louis-San Francisco Railway Company was let into the possession of the railroad of the defendant under and in accordance with the Order Confirming Sale, entered in the above entitled

[fol. 546] cause on August 29, 1916. A receipt of said St. Louis-San Francisco Railway Company, showing the payment to and receipt by it of said sum, is hereto attached, marked "Exhibit A," and made a part hereof.

Your Receivers ask that this, their final report, be ap-

proved.

Respectfully submitted, James W. Lusk, Wm. B. Biddle, Receivers.

Approved by me, June 25, 1917. Thomas T. Fauntleroy, Special Master.

[fol. 547 & 548] EXHIBIT A TO REPORT OF RECEIVER

In the District Court of the United States Within and for the Eastern Division of the Eastern District of Missouri

In Equity No. 4174

NORTH AMERICAN COMPANY, Complainant,

V.

St. Louis and San Francisco Railroad Company, Defendant

# Consolidated Cause Final

Received of James W. Lusk, William C. Nixon and William B. Biddle, Receivers in the above entitled cause, the sum of Six Million Two Hundred and Thirty-three Thousand Three Hundred and Fifty-two Dollars and Thirty-five Cents (\$6,233,352.35), being the total amount of cash balance in the hands of said Receivers in said cause as of this date.

Dated at St. Louis, Missouri, November 1, 1916. St. Louis-San Francisco Railway Co., by F. H. Hamilton, Its Treasurer.

[fol. 549] At this point it was stipulated between counsel for interveners and counsel for the defendant and the St. Louis-San Francisco Railway Company, that the defendant company had on hand approximately \$600,000 at the

time of the appointment of the receivers under the general creditors' bill; that of this amount three hundred and thirty-four thousand and some odd dollars, as shown in the agreed statement of facts, was received by the receivers, the remainder of the approximately \$600,000 having been appropriated by the banks in offset of indebtedness of the railroad company to the banks.

Mr. Miller: Appropriated from the deposits in the banks and credited to the railroad company.

Mr. Murphy: Yes. (P. 47.)

Mr. Miller: The fact of their appropriation was not established until some months after the receivers were appointed.

Mr. Murphy: Yes. Now, I would like to offer in evidence the final report of the receivers and the order discharging the receivers. I have the order discharging the receivers, but I will supply the final report of the receivers.

Mr. Miller: Same objection.

The Master: I will admit it subject to the objection.

To which ruling of the Master the defendant then and there duly excepted.

Said order discharging the receivers was marked Exhibit 18, and is in words and figures as follows, to-wit:

Exhibit 18, Order Discharging Receivers—Filed Aug. 15, 1923. Jas. J. O'Connor, Clerk

# Order No. 210

IN THE DISTRICT COURT OF THE UNITED STATES WITHIN AND FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI

# No. 4174. In Equity

NORTH AMERICAN COMPANY, Complainant,

1'8.

St. Louis and San Francisco Railroad Company, Defendant

# Consolidated Cause Final

This cause duly came on this day to be again heard upon the application of Receivers, St. Louis-San Francisco Rail-[fol. 550] way Company and complainant, for the discharge of said Receivers from further service herein, and it appearing to the Court that the final report of said Receivers has been duly filed and approved by the Court and their compensation duly paid, and there being no cause why said Receivers should not be discharged, upon consideration whereof,

It is ordered, adjudged and decreed, that the Receivers herein, James W. Lusk and William B. Biddle, be, and they hereby are, finally discharged as Receivers in this cause, and their official bonds and the sureties thereon are hereby

released and discharged.

It is further ordered, adjudged and decreed, that this cause is retained and kept open, and the Court reserves jurisdiction thereof and of all questions heretofore reserved in this cause, whether by the Final Decree entered herein March 31, 1916, the Order of Confirmation entered herein. August 29, 1916, the Order of Distribution entered herein November 6, 1917, or otherwise, including jurisdiction to ascertain and determine all claims, demands and liabilities against said Receivers and against the railroad and property delivered by said Receivers to the purchaser thereof under orders of this Court, and against such purchasers. which have arisen, or may arise, out of said receivership, All such claims, demands and liabilities, if not paid by said purchaser in due course, shall be made and presented by intervention in this Court for the purpose of being ascertained and determined in and by such proper intervention proceedings, and any orders, judgments or decrees so rendered in such proceedings may be enforced, and shall only be enforced, against the railroad and property so delivered by said Receivers to said purchaser, to the same extent and in the same manner as provided in the final decree and order confirming the sale of said railroad and property heretofore made and entered herein. Such intervention proceedings shall be filed in this cause in this Court on or before the first day of September, 1918, and after that date no further such intervention shall be permitted in this cause, and the rights of any claimants who shall not, on or before such date, have commenced intervention proceedings to avail themselves of the remedies herein provided for their benefit, shall cease and determine as to such railroad and property and the purchaser thereof.

It is further ordered, adjudged and decreed, that St. Louis-San Francisco Railway Company, the purchaser aforesaid, shall cause notice of the contents of this order [fol. 551] to be published in daily newspapers published respectively in the cities of Birmingham, Alabama; Memphis, Tennessee, and St. Louis, Missouri, the publication of such notice to begin not more than thirty days from the date hereof, and continue for once a week for a period of five weeks; and said St. Louis-San Francisco Railway Company shall also, within 30 days from the date hereof, cause a copy of this order to be mailed or otherwise transmitted to all parties known to it to be asserting claims or demands arising out of said receivership.

It is further ordered, adjudged and decreed, that all such claims and demands filed in this cause pursuant to this order be, and the same hereby are, referred to the Special Master heretofore appointed in this cause, who shall hear and report thereon to the Court with his recommendations; that said St. Louis-San Francisco Railway Company, be, and it is hereby, allowed 20 days from the date of the filing of such intervening petitions in which to answer or otherwise plead thereto respectively, and the respective claimants may reply or otherwise plead to said answers respectively

within twenty days after the filing thereof.

It is further ordered, adjudged and decreed, that said St. Louis-San Francisco Railway Company shall have the right if it so elects, and at its own cost and expense, to be substituted a party in lieu of said Receivers in all or any litigation by or against said Receivers now pending on appeal or otherwise, or continue such litigation in the name of said Receivers.

Walter H. Sanborn, Circuit Judge.

January 29, 1918.

North American Company, one of the complainants in the above entitled cause, hereby consents to the making and entering of the above and foregoing order in said cause.

Thomas Bond, Its Solicitor.

Rail Joint Company, one of the complainants in the above entitled cause, hereby consents to the making and entering of the above and foregoing order in said cause.

Blodgett & Rector, Its Solicitors.

Bankers Trust Company and Neill A. McMillan, as Trustees, complainants in the above entitled cause, hereby confol. 552] sent to the making and entering of the above and foregoing order in said cause.

Bankers Trust Company and Neill A. McMillan, as Trustees, by Nagel & Kirby, Their Solicitors.

St. Louis and San Francisco Railroad Company, defendant in the above entitled cause, hereby consents to the making and entering of the above and foregoing order in said cause.

W. F. Evans, Its Solicitor.

St. Louis-San Francisco Railway Company hereby consents to the making and entering of the above and foregoing order in said cause.

W. F. Evans, Its Solicitor.

Guaranty Trust Company of New York, Trustee, complainant in the above entitled cause, hereby consents to the making and entering of the above and foregoing order in said cause.

Guaranty Trust Company of New York, Trustee, by Franklin Ferriss, Its Solicitor.

Received, filed and entered, Jan. 29, 1918. W. W. Nall, Clerk.

Mr. Murphy: That is the final report of the receivers showing the amount of eash on hand from operations turned over to the St. Louis-San Francisco Railway Company. I presume that the Master and the court will take judicial knowledge of the final decree.

The Master: I couldn't tell you what would be my legal rights in that matter

Mr. Miller: Why don't you offer it in evidence?

Mr. Murphy: Well, there's a great deal of it that don't

bear upon either your contentions or mine.

[fol. 553] Mr. Cowan: Mr. Miller, will you procure and file a statement showing the result of the operations from the year 1906 on down, as shown in the reports of the Interstate Commerce Commission?

Counsel for interveners offered in evidence a statement showing the operating income and the operating expense from 1906. Counsel for defendant objected to said statement for the reasons stated before; which objection was overruled by the Master, and said statement was admitted in evidence and marked Exhibit 18a.

To which ruling of the Master defendant duly excepted and still excepts. Said statement is in words and figures

as follows:

[fol. 554]

# EXHIBIT 18A

St. Louis San Francisco Railway Company

Railway Operating Revenues, Expenses, Taxes, and Operating Income Years Ended June 30, 1966, to 1912, Inclusive, and July 1, 1912, to May 27, 1913, Inclusive

Railway operating income	\$10,796,498.23	9,944,600,85 11,455,890,81	11,299,278,35	11.626.239.11	\$92,471,350,28
Total exp. and taxes	\$19,955,559,13 25,938,551	23,960,427,75 24,195,908,93	27,881,779,92 79,967,962	27,991,949,22 27,694,993,42	8204,067,503,00
Railway tax accruals	\$521,697,01	548,531,64 1,027,081,82	946,288,31 1,267,594,18	1,240,456,90	\$7,448,350.88
Operating expenses	\$19,434,142,72	23,168,917.11	26,885,491,61 27,230,368,09	26,611,473,29 26,454,506,52	\$196,619,152.12
Operating revenues	\$30,752,337,96 37,190,857,78	35,905,028, 61 35,651,389, 11	40,842,519,45	39,447,473,08	NO. 0028,800,800
	Year ended June 30, 1905.	do. 1908.	do. 1911	lay 27, 1913	Total

Office of General Auditor, St. Louis, Missourl. December 15th, 1921.

[fol. 555] Mr. Murphy: I offer now the notice, marked Exhibit 19, which was served upon the various parties, testified to by Mr. Cowan.

Mr. Miller: That is objected to for the same reasons as stated previously, that no appeal was taken by the interveners from the order confirming the sale, or final decree or from any other order or decree in the receivership cases, is wholly incompetent and not material to any of the issues.

Objection overruled.

To which ruling of the Master the defendant then and there duly excepted. Said paper marked Exhibit 19 is in words and figures as follows, to-wit:

(Exhibit 19, Notice to Reorganization Committee, etc.)

To Hon. Henry W. Taft, attorney for reorganization Committee and the St. Louis & San Francisco Railway Company, and others growing out of the receivership and the reorganization plan and the sale of property of the St. Louis & San Francisco Railroad Company to the St. Louis & San Francisco Railroad Company that it appears from the orders and proceedings in Consolidated Cause No. 4174 in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, North American Company, Plaintiff, vs. The St. Louis & San Francisco Railroad Company, Defendant:

You are hereby notified that E. B. Spiller and others whose names appear as plaintiffs in the copies of the Judgments in cause No. 4308, E. B. Spiller, vs. Missouri, Kansas & Texas Ry. Co., et al., and in cause No. 4320, E. B. Spiller, and others, Plaintiffs, vs. Missouri, Kansas & Texas Ry. Co., and others, Defendants, included in both causes is the Defendant, St. Louis & San Francisco Railroad Co., copies of which judgments as they pertain to the St. Louis & San Francisco Railroad Company are hereto attached. The said plaintiffs are judgment creditors of the St. Louis & San Francisco Railroad Company in the several amounts shown in said judgments arising out of the operation of the said Railroad Company in the collection of unlawful rates of freight on shipments of cattle as shown in said

judgments, held by the Interstate Commerce Commission to be unreasonable and which unreasonable rates to the amount held by the Interstate Commerce Commission to have been unreasonable as shown by said judgments and the order of the Interstate Commerce Commission referred to therein, was unlawfully collected and used by said Comfol. 556] pany in the same manner as other freight charges collected, on account of all of which the said plaintiffs in said judgment will assert their rights of payment thereof by the St. Louis & San Francisco Railway Company which has been organized to and have purchased the property of said St. Louis & San Francisco Railroad Company, the confirmation of which sale is now pending in said cause wherein the Receivers of the St. Louis & San Francisco Railroad Company were appointed by said Court.

That no notice of any of the proceedings or orders of said Court or of the action of the Receivers or any of their agents thereof have ever been served on the plaintiffs or any of them or their attorneys, and they have in no way participated in any of the proceedings in said cause wherein the Receivers were appointed or in any way became parties

thereto.

That the Receivers though well knowing that the said order of the Interstate Commerce Commission was duly issued, served upon the St. Louis & San Francisco Railroad Company as provided by law, and when suit was filed thereon the agents of the Receivers at Kansas City, Mo., were served with original process in said cause wherein said judgment was rendered, and the attorneys for the St. Louis & San Francisco Railroad Company appeared in said cause and objected to said service upon said agent of the Receivers at Kansas City, said attorneys being at the same time attorneys for said Receivers, and appeared in said cause as attorneys of record and participated in the defense of the St. Louis & San Francisco Railroad Company in said cause and still are attorneys of record therein.

That the said indebtedness to plaintiffs aforesaid owing by the St. Louis & San Francisco Railroad Company, were not listed by the Receivers aforesaid as claims against or owing by the St. Louis & San Francisco Railroad Company and have not been paid, nor have my provisions been made for their payment by the said Receivers or order of said Court, or by the St. Louis & San Francisco Railroad Company or St. Louis and San Francisco Railway Company aforesaid, or by the purchasing committee of said new organization or anyone else, of the said judgments or any part thereof or of the amounts ordered by the Interstate Commerce Commission to be paid aforesaid and as shown in the said order of the Interstate Commerce Commission.

[fol. 557] Therefore these plaintiffs as shown in said judgments claim that the purchaser of said property takes it subject to all the rights of said plaintiffs, and that their said rights for full payment thereof is a lawful charge against the said St. Louis & San Francisco Railway Company aforesaid, purchasers of the property and assets of the said St. Louis & San Francisco Railroad Company, if the sale be confirmed.

That as to said plaintiffs the sale of said property to the St. Louis & San Francisco Railway Company is fraudulent and void, and said plaintiffs in whose behalf said judgments have been rendered are entitled to have the property so sold and assets acquired or to be acquired by the purchaser, either the purchasing committee or the St. Louis & San Francisco Railway Company if it shall be the purchaser applied to the payment of said plaintiffs' debt by virtue of their rights as judgment creditors aforesaid.

——, Attorneys for E. B. Spiller and the other plaintiffs in whose behalf said judgments were rendered.

St. Louis Mo., August 29, 1916.

Exhibits A and B, attached to original are omitted here as said Exhibit "A" is identical with Exhibit "B" attached to the intervening petition of E. B. Spiller, heretofore set out; and Exhibit "B," attached to original as aforesaid, is identical with Exhibit "B" attached to the intervening petition of E. B. Spiller, et al.

Mr. Murphy: I will offer in evidence articles 9-10 and 14 of the final decree, with this understanding: that if there are other articles in the decree which either party may consider pertient and relevant, they may be inserted in the record.

Mr. Miller: I object to the offer in that form. I think the final decree should be offered in evidence, and then reference made to the particular articles which either party may desire to call attention to, but I wouldn't be willing to offer part of the final decree.

Mr. Murphy: We will offer in evidence Exhibit 20, which is the final decree in the case of the North American Comfol. 558] pany, Complainant, vs. the St. Louis and San Francisco Railroad Company, in Equity, No. 4174, Consolidated Cause Final, with the understanding that either party may put into the record such portions of it as may be deemed pertinent and relevant.

Said paper marked Exhibit 20, is in words and figures as follows, to-wit:

EXHIBIT 20, FINAL DECREE—Filed Aug. 15, 1923. Jas. J. O'Connor, Clerk

At a Term of the District Court of the United States for the Eastern Division of the Eastern District of Missouri, in the Eighth Judicial Circuit, in the City of St. Louis, on the 31st Day of March, 1916.

Present: Hon. Walter H. Sanborn, United States Circuit Judge.

No. 4174. In Equity

NORTH AMERICAN COMPANY, Complainant.

against

St. Louis and San Francisco Railroad Company, Defendant

No. 4174. In Equity

NORTH AMERICAN COMPANY, Complainant,

against

St. Louis and San Francisco Railroad Company, Defendant No. 4290. In Equity

RAIL JOINT COMPANY, Complainant,

against

St. Louis and San Francisco Railroad Company, Defendant

No. 4304. In Equity

Bankers Trust Company and Neill A. McMulan, as Trustees, Complainants,

against

St. Louis and San Francisco Railroad Company, Defendant

No. 4334. In Equity

Guaranty Teust Company of New York, as Trustee, Complainant

against

St. Louis and San Francisco Railroad Company, Bankers Trust Company, and Neill A. McMillan, Defendants.

# Consolidated Cause Final

# Final Decree

This consolidated cause came on to be heard at this term on the bill of complainant of North American Company and the answer thereto of the defendant to said bill; on the bill of complaint of Rail Joint Company and the answer thereto of the defendant to said bill; on the bill of complaint and [fol. 559] the amended and supplemental bill of complaint of Bankers Trust Company and Neill A. McMillan, as trustees, and the answers thereto of the defendant to said bill and said amended and supplemental bill; on the bill of complaint and the amended and supplemental bill of complaint of Guaranty Trust Company of New York, as trustee, the answers thereto and cross bill of Bankers Trust Company and Neill A. McMillan, as trustees, and the answers of the

defendant Railroad Company to said bill of complaint and amended and supplemental bill, the reply of the complainant to said cross bill, and upon the proofs, and was argued by counsel, and thereupon, upon consideration thereof, the Court being fully advised in the premises, finds, adjudges and decrees as follows:

- I. At all times mentioned in that behalf in the various pleadings in this consolidated cause and in the constituent causes, the defendant Railroad Company was, and it still is, a corporation organized and existing under the laws of the State of Missouri, and a citizen of said State of Missouri, having its office and principal place of business in the City of St. Louis in the State of Missouri, and a resident and inhabitant of the Eastern Division of the Eastern District of said State, and was and is duly authorized to borrow money for the corporate purposes set out in its Refunding Mortgage and its General Lien Mortgage hereinafter described and to secure the same by mortgage or deed of trust.
- II. At all times mentioned in that behalf in the bill of complaint and in the amended and supplemental bill of complaint of Guaranty Trust Company of New York and until January 27, 1910, Morton Trust Company was a corporation duly organized and existing under the laws of the State of New York. Said Morton Trust Company was duly authorized and empowered to take the property transferred and conveyed to it and William H. Thompson as trustees, by the defendant Railroad Company under and by the Refunding Mortgage of said Railroad Company dated June 20, 1901, hereinafter described and in this decree termed the Refunding Mortgage, and to execute the trusts set forth and declared in the Refunding Mortgage.

On or about said January 27, 1910, Morton Trust Company pursuant to proceedings duly and regularly taken and had in compliance with the provisions of the statutes of the State of New York applicable thereto, became merged into [fol. 560] said Guaranty Trust Company of New York.

III. Said Guaranty Trust Company of New York is and was at all times mentioned in that behalf in the bill of complaint and in the amended and supplemental bill of com-

plaint of said Guaranty Trust Company of New York, as trustee, a corporation duly organized and existing under the laws of the State of New York, and a citizen of said State, and a resident and inhabitant of the Southern District of New York, and was and is duly authorized and empowered to take the property transferred and conveyed under and pursuant to the Refunding Mortgage, and to execute the trusts set forth and declared therein, and since said merger has been and is the lawful successor of said Morton Trust Company in the trusts declared by the Refunding Mortgage.

William H. Thompson at the time of the execution and delivery of the Refunding Mortgage, was a resident and citizen of the State of Missouri and remained continuously a resident and citizen of the State of Missouri until his death on or about December 6, 1905. From said lastmentioned date until January 27, 1910, said Morton Trust Company was the sole trustee under the Refunding Mortgage, and since January 27, 1910, said Guaranty Trust Company of New York has been the sole trustee under the

Refunding Mortgage.

Bankers Trust Company is and was at all times since March 25, 1903, and at all times mentioned in that behalf in the bill of complaint and in the amended and supplemental bill of complaint of said Bankers Trust Company and Neill A. McMillan, as trustees, a corporation duly organized and existing under the laws of the State of New York, and a citizen of said State, and a resident and inhabitant of the Southern District of New York, and was and is duly authorized and empowered to take the property transferred and conveyed to it and Neill A. McMillan under and pursuant to the General Lien Mortgage of the defendant Railroad Company, dated August 27th, 1907 (hereinafter termed the General Lien Mortgage), and to execute the trust therein set forth and declared.

Neill A. McMillan at all times mentioned in that behalf in the bill of complaint and in the amended and supplemental bill of complaint of said Bankers Trust Company and said Neill A. McMillan, as trustees, was, and he now is, a resident of the City of St. Louis, in the State of Missouri, in the Eastern Division of the Eastern District of Missouri and a citizen of said State of Missouri [fol. 561] North American Company is and at all times mentioned in that behalf in its bill of complaint was a corporation duly organized and existing under the laws of the State of New Jersey, and a citizen of said State and a resident and inhabitant thereof.

Rail Joint Company is, and at all the times in that behalf mentioned in its bill of complaint was, a corporation duly organized and existing under the laws of the State of New York and a citizen of said State and a resident and inhabitant thereof.

IV. Heretofore and on or about the 20th day of June, 1901, the defendant Railroad Company, being thereunto duly authorized by law, desiring to borrow money for the purpose of funding certain of the indebtedness to which certain of its railroads, equipment and property were subject, and to provide for making additions to and extensions of its railroads and other property, and for the purpose of additional equipment and property, pursuant to due and lawful authority and to due corporate action on the part of its board or directors and of its stockholders, duly authorized the creation of its fifty (50) year Gold Bonds, to be known as its Refunding Mortgage Gold Bonds (in this decree termed Refunding Bonds), to be dated June 20th, 1901, to mature July 1st, 1951, and to bear interest at a rate not exceeding four per cent (4%) per annum, payable semiannually on the first days of January and July in each year, the total authorized issue of Refunding Bonds to be limited to the aggregate principal sum of eighty-five million dollars (\$85,000,000) at any one time outstanding.

V. On or about said 20th day of June, 1901, the defendant Railroad Company, pursuant to due and lawful authority and due corporate action on the part of its board of directors and of its stockholders, and in order to secure the payment of the principal and interest of the Refunding Bonds when the same should become due and payable, and for the other purposes therein set forth, executed and delivered to said Morton Trust Company and William H. Thompson, as trustees, the Refunding Mortgage, and therein it granted, bargained, sold, released, conveyed and confirmed unto said trustees, their successors in the trust and their assigns forever the property therein described. Exhibit A to the

amended and supplemental bill of complaint of Guaranty Trust Company of New York, as trustee, is a true copy of the Refunding Mortgage. The Refunding Mortgage was executed and delivered in all respects in conformity with law, and the trustees therein named duly accepted the [fol. 562] trusts therein and thereby created. The Refunding Mortgage was thereafter duly recorded in accordance with and as required by law and in every office in which required by law to be so recorded and in every county in which the lines of railroad and other real property of the defendant Railroad Company covered by the Refunding Mortgage were or are situated or located.

VI. Of the Refunding Bonds, sixty-eight million, six hundred and sixty-six thousand dollars (\$68,666,000) face amount thereof, were duly executed by the defendant Railroad Company, and, as provided in the Refunding Mortgage, were duly authenticated by the endorsement thereon of the certificate of said Morton Trust Company, as trustee, or the certificate of said Guaranty Trust Company of New York, as trustee. Of the Refunding Bonds so authenticated. sixty-eight million five hundred and fifty-seven thousand dollars (\$68,557,000) face amount of Refunding Bonds bearing interest at the rate of four per cent (4%) per annum were duly issued, negotiated and sold and are in the hands of divers persons who are bona fide holders thereof as purchasers for value, and are outstanding, valid and subsisting obligations of the defendant Railroad Company in accordance with their terms. The remaining one hundred and nine thousand dollars (\$109,000) face amount of Refunding Bonds so authenticated, to-wit, 109 bonds for one thousand dollars each bearing the serial numbers 52867 to 52970, both inclusive, and 71585 to 71589, both inclusive, have not been issued, negotiated or sold and are not outstanding nor entitled for any purpose to the security of the Refunding Mortgage.

VII. Heretofore and on or about the 27th day of August, 1907, the defendant Railroad Company, being thereunto duly authorized by law, desiring to borrow money for the purpose of funding indebtedness to which certain of its railroads, equipment and property were subject, and to pro-

vide for making additions to, and extensions of, its railroads and other properties, and for the purchase of additional equipment and property and for other corporate purposes, pursuant to due and lawful authority and to due corporate action on the part of its board of directors and of its stockholders, duly authorized the creation of its General Lien 15-20 Year Gold Bonds (in this decree termed General Lien Bonds), to be payable May 1, 1927, in gold coin of the United States of America of the then present standard of weight and fineness, and to bear interest at such rate or rates not exceeding five per cent (5%) per annum, [fol. 563] as from time to time should be fixed and determined by the board of directors or executive committee of defendant Railroad Company and should be designated in the General Lien Bonds when issued, payable semi-annually on the first days of November and May in each year in like gold coin, the total authorized issue of General Lien Bonds to be limited to the aggregate principal sum of one hundred and fifteen million dollars (\$115,000,000) at any one time outstanding.

VIII. On or about said 27th day of August, 1907, the defendant Railroad Company, pursuant to due and lawful authority and to due corporate action on the part of its board of directors and its stockholders, and in order to secure the payment of the principal and interest of the General Lien Bonds when the same should become due and payable, and for the other purposes therein set forth, executed and delivered to said Bankers Trust Company and Neill A. Mc-Millan, as trustees, its General Lien Mortgage, and therein it granted, bargained, sold, released, conveyed and confirmed unto said trustees, their successors in the trust and their assigns forever the property therein described. Exhibit A to the amended and supplemental bill of complaint of Bankers Trust Company and Neill A. McMillan, as trustees, is a true copy of the General Lien Mortgage. The General Lien Mortgage was executed and delivered in all respects in conformity with law, and the trustees therein named duly accepted the trusts therein and thereby created, and the General Lien Mortgage was thereafter duly recorded in accordance with and as required by law, and in every office in which required by law to be so recorded, and in every county and parish wherein any of the lines of railway or real property subject to the General Lien Mortgage was or is situated, and in the office of the Secretary of the Interior of the United States.

IX. Thereafter and on or about the 31st day of December, 1908, the defendant Railroad Company and said Bankers Trust Company and Neill A. McMillan, as trustees under the General Lien Mortgage, entered into an agreement supplementary to the General Lien Mortgage, among other things prescribing that the authorized aggregate principal amount of General Lien Bonds should not exceed one hundred and nine million eight hundred and fifty thousand four hundred dollars (\$109,850,400) at any one time outstanding. Exhibit B to the amended and supplemental bill of complaint of the complainants Bankers Trust Company and Neill A. McMillan is a true copy of said agree-Said agreement was duly recorded in accordance [fol. 564] with and as required by law, and in every office in which required by law to be so recorded and in which the General Lien Mortgage had been recorded, and in every county and parish wherein any of the lines of railway or real property subject to the General Lien Mortgage was or is situated and in the office of the Secretary of the Interior of the United States.

Thereafter said defendant Railroad Company and said Bankers Trust Company and Neill A. McMillan, as trustees under the General Lien Mortgage, duly entered into various agreements supplemental to the General Lien Mortgage. Exhibit C, Exhibit D, Exhibit E, Exhibit F, and Exhibit G to the amended and supplemental bill of complaint of said Bankers Trust Company and Neill A. McMillan are true copies of said agreements supplemental to the General Lien Mortgage. Said agreements supplemental to the General Lien Mortgage were duly made by the defendant Railroad Company in pursuance of lawful authority and of due corporate action. Said supplemental agreement, of which Exhibit C is a copy, upon the execution and delivery thereof, was promptly and duly recorded in the offices of the Recorders of Deeds for the City of St. Louis and the County of St. Louis, State of Missouri,

X. Of the General Lien Bonds, General Lien Bonds in the face amount of sixty-nine million five hundred and

twenty-four thousand dollars (\$69,524,000), bearing interest at the rate of five per cent. (5%) per annum, were duly executed by the defendant Railroad Company, and, as provided in the General Lien Mortgage, were duly authenticated by the endorsement thereon of the certificate of said Bankers Trust Company as trustee. Of the General Lien Bonds so authenticated, sixty-nine million, three hundred and eighty-four thousand dollars (\$69,384,000) thereof were duly issued, negotiated and sold, and are in the hands of divers persons who are bona fide holders thereof as purchasers for value, and are outstanding, valid and subsisting obligations of the defendant Railroad Company in accordance with their terms. The remaining one hundred and forty thousand donars (\$140,000) face amount of General Lien Bonds so authenticated, to wit, 140 bonds for one thousand dollars each bearing the serial numbers 36,053 to 36,192, both inclusive, have not been issued, negotiated or sold, and are not outstanding nor entitled for any purpose to the security of the General Lien Mortgage.

XI. On or about June 1, 1911, the defendant Railroad Company issued its Two Year Five Per Cent. Secured Gold Notes maturing June 1, 1913, to the aggregate amount of [fol. 565] \$2,250,000 and to secure said Notes entered into a Collateral Trust Agreement of even date with Old Colony Trust Company, as trustee, under which there have been pledged the following securities, which are inadequate for the payment of said indebtedness:

- (a) \$2,500,000 St. Louis and San Francisco Railroad Company Common Stock Trust Certificates, issued in respect of Chicago and Eastern Illinois Railroad Company's Common Stock;
- (b) \$1,490,000, of The Kansas City, Fort Scott and Memphis Railway Company Guaranteed Four Per Cent. Preferred Stock Trust Certificates;
- (c) \$100,000 General Lien Bonds of the defendant Railroad Company.

All said Notes are outstanding and unpaid and no interest has been paid thereon since December 1, 1912.

XII. On or about September 3, 1912, the defendant Railroad Company issued its Two Year Six Per Cent. Secured

Gold Notes maturing September 1, 1914, to the aggregate amount of \$2,600,000 and to secure said notes entered into a Trust Agreement of even date with The Equitable Trust Company of New York, as trustee under which there have been pledged the following securities, which are inadequate for the payment of said indebtedness:

- (a) 20,000 shares of stock of New Orleans, Texas and Mexico Railroad Company;
- (b) \$4,229,185.09 promissory notes of said last named Company and all other indebtedness of said last named Company to the defendant Railroad Company, except New Orleans, Texas and Mexico Division, First Mortgage Bonds:
- (c) 14,000 shares preferred stock of the Kirby Lumber Company;
- (d) 700 shares stock of the San Benito & Rio Grande Valley Railway Company;
- (e) \$625,495 Six Per Cent. First Mortgage Bonds of said last named Company;
- (f) All other indebtedness of said last named Company to the defendant Railroad Company.

[fol. 566] All said Notes are outstanding and unpaid and no interest has been paid thereon since March 1, 1913.

XIII. On, and for some time prior to May 27, 1913, the defendant Railroad Company was justly indebted to the complainant North American Company on the promissory note of the defendant Railroad Company in the principal sum of four hundred thousand dollars (\$400,000), and there was on said last named date due, owing and unpaid by the defendant Railroad Company on its said promissory note the principal thereof together with interest thereon at the rate of six per cent. (6%) per annum from May 21, 1913. No part thereof has been paid except the interest accrued thereon to February 10, 1916, and there is due thereon at the date of this decree the sum of \$400,000, together with interest thereon from February 10, 1916, at the rate of six per cent. (6%) per annum. Said note is secured by the pledge, on the terms thereof, of the following securities:

- (a) \$8,000,000 Stock New Mexico and Arizona Land Company.
- (b) \$5,000,000 First Mortgage Bonds New Mexico and Arizona Land Company.
- (c) \$200,000 St. Louis and San Franneisco Railroad Company, New Orleans, Texas and Mexico Division First Mortgage Bonds.

XIV. On and for some time prior to May 27, 1913, the defendant Railroad Company was justly indebted to the complainant Rail Joint Company for goods sold and delivered. On or about February 26, 1914, said complainant Rail Joint Company obtained against the defendant Railroad Company in this Court a judgment on account of said indebtedness for \$7,447.65 on which execution was on March 26, 1914, issued and returned unsatisfied. No part thereof has been paid and there is due thereon at the date of this decree the sum of seven thousand, four hundred forty-seven and 65/100 dollars (\$7,447.65) with interest thereon at the rate of six per cent. (6%) per annum.

XV. The defendant Railroad Company was, on said May 27th, 1913, indebted to divers other persons and corporations in divers amounts then past due; the defendant Railroad Company then was and ever since has been unable to meet its matured obligations; its assets were not at that time nor have they since been of sufficient value to realize sufficient to pay its liabilities as they matured and accrued, and the defendant Railroad Company was then and ever since has been insolvent.

[fol. 567] XVI. Thereupon and on or about said May 27th, 1913, the defendant Railroad Company being so indebted, said North American Company in behalf of itself and of the other creditors of the defendant Railroad Company filed its bill of complaint in this Court against the defendant Railroad Company alleging the insolvency of the defendant Railroad Company and praying for the administration of the entire property and assets of the defendant Railroad Company, for the enforcement of the rights, liens and equities of the creditors of the defendant Railroad Company, and for the appointment of receivers of the railroads and property of the defendant Railroad Company. There-

after the defendant Railroad Company duly filed its answer to said bill of complaint admitting its insolvency and all other material allegations of the bill of complaint. proceedings thereupon were had in said cause that this Court granted the prayer of said bill and duly appointed Receivers of all the franchises, liens, claims, rights, interest and property of every name and nature, either at law or in equity, and wherever situated, of the defendant Railroad Company and said Receivers so appointed, having duly qualified as Receivers as aforesaid, thereupon entered into possession of said property of which they had been so appointed receivers. Within ten days thereafter a duly certified copy of said bill of complaint and of said order were duly filed in the District Court of the United States for each district of the Eighth Circuit in which any portion of the property of the defendant Railroad Company then lay or was situated, and said property has ever since been in the custody of this Court through its receivers duly appointed, and was so in the custody of this Court through its receivers at the time of the filing in this Court of the bill of complaint and the amended and supplemental bill of complaint of said Bankers Trust Company and Mc-Millan, the trustees of the General Lien Mortgage, and of the bill of complaint and of the amended and supplemental bill of complaint of said Guaranty Trust Company of New York, the surviving and sole acting trustee under the Refunding Mortgage. From time to time after said May 27, 1913, in actions of similar character instituted in the District Courts of the United States for the Northern District of Alabama, Southern Division, Northern District of Mississippi, Western Division, and Western District of Tennessee. Western Division, respectively, by said North American Company against the defendant Railroad Company, similar orders were made in each of the debt represented by the said promissory note of the ceedings have been had at law or in equity for the collection of the debt represented by the said promissory note of the defendant [fol. 568] Railroad Company held by the complainant North American Company.

XVII. The defendant Railroad Company made default in the payment of the installment of interest due May 1, 1914, upon all the General Lien Bonds issued and outstanding; said default still continues, although demand was duly made at the place named in the General Lien Bonds and in the General Lien Mortgage for the payment of said installment of interest, and there remains due, owing and unpaid on said installment of interest the sum of one million seven hundred and thirty-four thousand six hundred dollars (\$1,734,600) with interest thereon from May 1, 1914, at the rate of five per cent. (5%) per annum.

XVIII. Thereupon and on or about the 22nd day of May. 1914, leave of this court having first been duly obtained, said Bankers Trust Company and Neill A. McMillan, as trustees, filed their bill in this Court against the defendant Railroad Company alleging the possession by this Court through its receivers of the mortgaged premises and paying for the administration of the trusts under the General Lien Mortgage and for the sale of the mortgaged premises. Prior to the filing of said bill of complaint, this Court had, on or about April 3, 1914, consolidated said cause wherein said North American Company was complainant with a cause then pending in this Court against the defendant Railroad Company wherein Rail Joint Company was complainant and wherein similar relief was sought and prayed. Such proceedings were thereafter had under said bill of complaint of said Bankers Trust Company and Neill A. McMillan, as trustees as aforesaid, that this Court, by order duly entered on or about the 24th day of June, 1914, consolidated the consolidated suit aforesaid and said suit of said Bankers Trust Company and Neill A. McMillan, as trustees, under the title North American Company, complainant, against St. Louis and San Francisco Railroad Company, defendant, and each and all appointments of the receivers in said consolidated cause, consolidated pursuant to said order of April 3, 1914, were adopted as appointments of receivers in said cause instituted by said Bankers Trust Company and McMillan, as trustees, and in the consolidated cause consolidated pursuant to said order of June 24, 1914. Within ten days thereafter a duly certified copy of said bill of complaint of said trustees and of said order were duly filed in the District Court of the United States for each District in the Eighth Circuit in which any portion of the property of the defendant Railroad Company then lay or was situated

[fol. 569] From time to time thereafter actions of similar character against the defendant Railroad Company were instituted in the District Courts of the United States for the Northern District of Alabama, Southern Division; Northern District of Mississippi, Western Division, and Western District of Tennessee, Western Division, respectively.

XIX. The defendant Railroad Company made default in the payment of interest due November 1, 1914, upon all the General Lien Bonds issued and outstanding; said default still continues, although demand was duly made at the place named in the General Lien Bonds and in the General Lien Mortgage for the payment of said installments of interest, and there remains due, owing and unpaid on said installment of interest the sum of one million seven hundred and thirty-four thousand six hundred dollars (\$1,734,600) with interest thereon from November 1, 1914, at the rate of five per cent. (5%) per annum.

XX. Pursuant to the provisions of the General Lien Mortgage, and on or about the thirtieth day of November, 1914, said default in the payment of the interest on the General Lien Bonds which became due as aforesaid on May 1, 1914 having continued for upwards of six months, said Bankers Trust Company and Neil! A. McMillan, the trustees under the General Lien Mortgage, by notice in writing duly given to the defendant Railroad Company duly declared the principal of all General Lien Bonds then outstanding to be due and payable immediately, and the same became due and immediately payable. No part of the principal of the General Lien Bonds has been paid, and the whole amount thereof is due, owing and unpaid by the defendant Railroad Company, with interest thereon from November 1, 1914, at the rate of five per cent (5%) per annum. Thereupon and on or about the 6th day of January, 1915, leave of this Court having first been duly obtained, said Bankers Trust Company and Neill A. Me-Millan, as trustees, filed their amended and supplemental bill of complaint against said defendant Railroad Company and North American Company, praying for the foreclosure of the General Lien Mortgage and for the sale of the mortgaged premises and filed a duly certified copy

of their said amended and supplemental bill of complaint in the District Courts of the United States for each district in the Eighth Circuit in which any portion of the property of the defendant Railroad Company lay or was situated. From time to time thereafter in said actions instituted by [fol. 570] said trustees against the defendant Railroad Company in the District Courts of the United States for the Northern District of Alabama, Southern Division; Northern District of Mississippi, Western Division, and Western District of Tennessee, Western Division, respectively, amended and supplemental bills of like character and praying similar relief were duly filed.

XXI. The amount due, payable and owing from the defendant Railroad Company at the date of this decree for principal and interest on the General Lien Bonds is as follows:

Installment of interest or coupons due May 1, 1914		00
Laterest thereon from May 1, 1914 to the date of this decree at the rate of five per cent (5%) per annum	r	50
11. stallment of interest or coupons due No vember 1, 1914		00
Interest thereon from November 1, 1914, to the date of this decree at the rate of five per cent (5%) per annum		50
Principal	69,384,000	00
Interest on said principal amount from November 1, 1914 to date of this decree, at the rate of five per cent (5%) per annum	t	00
Total	\$78,057,000	00

XXII. Except as aforesaid, no proceedings have been had at law or in equity for the collection of the debt secured by the General Lien Mortgage.

XXIII. The defendant Railroad Company made default in the payment of the installment of interest due July 1, 1914, upon all the Refulling Bonds issued and outstanding; said default still continues, although demand was duly made at the place named in the Refunding Bonds and in the Refunding Mortgage for the payment of said installment of interest, and there remains due, owing and unpaid on said installment of interest, the sum of one million three hundred and seventy-one thousand one hundred and forty dollars (\$1,371,140) with interest thereon from July 1, 1914, at the rate of four per cent. (4%) per annum.

XXIV. Thereupon and on or about the 9th day of July, 1914, leave of this Court having first been duly obtained, [fol. 571] said Guaranty Trust Company of New York, as trustee, filed its bill of complaint in this Court against said defendant Railroad Company, and said Bankers Trust Company and Neill A. McMillan, as trustees, alleging the posession by this Court through its receivers of the mortgaged premises and praying for the foreclosure of the Refunding Mortgage and for sale of the mortgaged premises.

XXV. Pursuant to the provisions of the Refunding Mortgage and on or about the seventh day of October, 1914, said default in the payment of interest having continued for upwards of three months, said Guaranty Trust Company of New York, trustee under the Refunding Mortgage, by notice in writing duly given to the defendant Railroad Company, duly declared the principal of all the Refunding Bonds then outstanding, to be due and payable immediately, and the same became due and immediately payable. No part of the principal of the Refunding Bonds has been paid, and the whole amount thereof is due, owing and unpaid by the defendant Railroad Company, with interest thereon from July 1, 1914, at the rate of four per cent. (4%) per annum.

Thereupon and on or about the 13th day of November, 1914, leave of this Court having first been duly obtained, said Guaranty Trust Company of New York, as trustee, filed its amended and supplemental bill of complaint in said suit instituted by it in this Court against the defendant Railroad Company and said Bankers Trust Company and Neill A. McMillan, as trustees, praying for the foreclosure of the Refunding Mortgage and for the sale of the mort-

gaged premises. Thereafter this Court by order duly entered on or about the 31st day of January, 1916, consolidated the consolidated cause consolidated pursuant to said order of June 24, 1914, and said suit of said Guaranty Trust Company of New York under the title North American Company, Complainant, against St. Louis and San Francisco Railroad Company and others, Defendants, In Equity No. 4174, Consolidated Cause, Final, and each and all appointments of receivers in said consolidated cause consolidated pursuant to said order of June 24, 1914, were adopted as appointments of receivers in said cause instituted by said Guaranty Trust Company of New York and in the consolidated cause consolidated pursuant to said order of January 31, 1916. Within ten days thereafter, a duly certified copy of said amended and supplemental bill of complaint and of said order of January 31, 1916, were duly filed in the District Court of the United States for each District [fol, 572] in the Eighth Circuit in which then lay or was situated any portion of the property of the defendant Railroad Company in which said Guaranty Trust Company of New York, as said trustee, had or claimed to have an interest under the Refunding Mortgage.

XXVI. The amount due, payable and owing from the defendant Railroad Company at the date of this decree for principal and interest on the Refunding Bonds is as follows:

Installment of interest or coupons due July 1, 1914	\$1,371,140 00
Interest thereon from July 1, 1914, to the date of this decree at the rate of four per cent. (4%) per annum	95,979 74
Principal	68,557,000 00
Interest on said principal amount from July 1, 1914, to the date of this decree at the rate at four per cent. (4%) per annum	4,798,990 00
Total .	\$74.823,109 74

XXVII. Except as aforesaid, no proceedings have been had at law or in equity for the collection of the debt secured by the Refunding Mortgage.

XXVIII. The lines of railroad of the Railroad Company, including leased lines and lines controlled through stock ownership and operated under operating contracts, form a complete railroad system, with appurtenant rolling stock, equipment and other property, real and personal, rights, privileges and franchises. The value of the property of the defendant Railroad Company is much greater as a whole than if dismembered and sold or disposed of in separate pieces or parcels and said property should, in order that the highest price therefor may be obtained, be offered for sale in such manner as to give the opportunity for the acquisition thereof as a whole.

XXIX. The Refunding Mortgage is a lien upon the property specified in Article Twenty-sixth of this decree and hereinafter directed to be sold. Said property is of greater value as an entirety than if separated into parcels, and in order that the highest price therefor may be obtained, said property should be offered for sale in such manner as to give opportunity for the acquisition thereof as a whole.

XXX. The General Lien Mortgage is a lien upon the property described in Article Twenty-seventh of this defol. 573] cree and hereinafter directed to be sold. Said property subject to the lien of the General Lien Mortgage is of greater value as an entirety than if separated into parcels, and in order that the highest price therefor may be obtained, said property should be offered for sale in such manner as to give opportunity for the acquisition thereof as a whole.

XXXI. Said properties subject to the lien of either the Refunding Mortgage or the General Lien Mortgage should, in order that the highest price therefor may be obtained, be offered for sale in such manner as to give opportunity for the acquisition of said mortgaged properties as a whole.

XXXII. The property of the defendant Railroad Company not subject to the lien of the Refunding Mortgage or to the lien of the General Lien Mortgage and specified in

Article Twenty-Ninth should, in order that the highest price therefore may be obtained, be offered for sale in such manner as to give opportunity for the acquisition thereof as a whole.

XXXIII. This consolidated suit is, as is each of the suits that have been consolidated, together constituting this consolidated cause, a civil suit in the nature of a suit in equity, and the matter in dispute in said consolidated cause and, as well in each of the constituent causes, exceeds, exclusive of interest and costs, the sum of five thousand dollars (\$5,000).

It is, therefore, Ordered, Adjudged and Decreed as follows:

Article First. The defendant Railroad Company is insolvent; it is unable to meet its matured obligations and indebtedness; its assets are not of sufficient value to meet its liabilities as they mature and accrue; its property should be administered and the net proceeds thereof distributed among its creditors in accordance with their respective priorities and rights. All property of every character and description of the defendant Railroad Company, including in said property so ordered sold, all property of every kind and description acquired or held by the Receivers in this cause, shall be sold in the manner and subject to the provisions hereinafter in this decree set forth, and all the right, title, interest and equity of redemption of the defendant Railroad Company, its creditors and stockholders, and of all persons claiming under it or them, or any of them, and of all parties to this consolidated cause and to each and [fol. 574] every of the constituent causes and of all persons claiming under them or any of them, of, in and to said property, and every part and parcel thereof, shall be forever barred and foreclosed, subject, however, to the provise of Article Eighteenth of this decree.

Article Second. The defendant St. Louis and San Francisco Railroad Company, or some one in its behalf, shall, within thirty days after the entry of this decree, pay or cause to be paid to Guaranty Trust Company of New York, as trustee, for the use and benefit of the holders of the outstanding Refunding Bonds, and of the coupons apper-

taining thereto which matured July 1, 1914, the sum of Seventy-four million, eight hundred and twenty-three thousand, one hundred and nine and 74/100 dollars (\$74.823,-109.74) in gold coin of the United States of America, with interest thereon at the rate of six per cent. per annum from the date of the entry of this decree to the date of payment. Within the same time, the defendant St. Louis & San Francisco Railroad Company, or some one in its behalf shall pay or cause to be paid to Bankers Trust Company and Neill A. McMillan, as trustees, for the use and benefit of the holders of the outstanding General Lien Bonds and of the coupons appertaining thereto which matured May 1, 1914, and November 1, 1914, respectively, the sum of Seventy-eight million, fifty-seven thousand dollars (\$78,057,000) in gold coin of the United State of America, with interest thereon at the rate of six per cent, per annum, from the date of the entry of this decree to the date of payment.

If such payments or either of them shall be so made, any of the parties to this suit may apply to this Court for such further instructions and for such further order and decree

as may be just and equitable.

Article Third. The sale directed by this decree shall be made without valuation, appraisement, redemption or extension, and shall be made by and under the direction of a Special Master to be appointed by this Court for that purpose and for the other purposes herein mentioned, and who is directed to make and conduct the said sale, and to execute a deed or deeds or other instrument or instruments of conveyance or assignment and transfer of the property sold to the purchaser or purchasers thereof, or his or their assigns, upon an order of this Court confirming such sale, and upon payment or settlement of the purchase price, or making provision therefor, as in this decree provided, or as may be permitted by any order or other decree made in this [fol. 575] cau e. Said sale shall be made at the train despatcher's office, near the point where the mortgaged lines of railroad cross the line of Chouteau Avenue in the City of St. Louis in the State of Missouri upon the property to be sold, on a day and at an hour to be fixed by the Special Master, or as the Court may order, and notice of the time and place and terms of sale describing briefly the property to be sold, and referring to this decree, shall be published at

least once a week for four successive weeks preceding the date of such sale, in a newspaper printed regularly issued, and having a general circulation, in the City of St. Louis, and State of Missouri, and in a newspaper published in the Borough of Manhattan, City of New York, State of New York.

The Special Master shall, at the joint request of the solicitors for the Guaranty Trust Company of New York, as trustee, and the solicitors for the Bankers Trust Company and Neill A. McMillan, as trustees, adjourn or postpone said sale, and may without further notice or advertisement proceed with the sale on any day to which the same may have been adjourned, and he may give such further notice of sale in addition to the notice herein provided, or of any adjournment, as may be jointly requested by the solicitors for the Guaranty Trust Company of New York, as trustee, and by the solicitors for the Bankers Trust Company and Neill A. McMillan, as trustees.

Any of said trustees or any holder of Refunding Bonds, or any holder of General Lien Bonds, or any creditor or any stockholder of the defendant Railroad Company, or any party to this consolidated cause or to any constituent cause may bid at the sale, and if a successful bidder may purchase

in his its or their own right.

Article Fourth. The property directed to be sold by this decree, whether sold as an entirety or in parcels, shall, in so far as the lien of any of the following instruments covers any of said property, be sold subject to the lien of such instrument viz.:

- (1) Mortgage or deed of trust, dated July 1, 1896, executed by St. Louis and San Francisco Railroad Company to The Mercantile Trust Company and Paschal P. Carr as Trustees, to secure Consolidated Mortgage Bonds of said St. Louis and San Francisco Railroad Company;
- (2) Mortgage or deed of trust dated January 1, 1898, executed by St. Louis and San Francisco Railroad Company to Central Trust Company of New York as Trustee, [fol. 576] to secure Southwestern Division First Mortgage Bonds of said St. Louis and San Francisco Railroad Company;

- (3) Mortgage or deed of trust, dated March 28, 1899, executed by St. Louis and San Francisco Railroad Company to Continental Trust Company of the City of New York as Trustee, to secure Central Division First Mortgage Bonds of said St. Louis and San Francisco Railroad Company;
- (4) Mortgage or deed of trust, dated October 1, 1900, executed by St. Louis and San Francisco Railroad Company to Continental Trust Company of the City of New York as Trustee, to secure Northwestern Division First Mortgage Bonds of said St. Louis and San Francisco Railroad Company;
- (5) Trust indenture, dated August 1, 1880, executed by St. Louis and San Francisco Railway Company to The United States Trust Company of New York as Trustee, to secure Trust Mortgage Six Per Cent Bonds of 1880 of said St. Louis and San Francisco Railway Company;
- (6) Trust indenture, dated December 15, 1887, executed by St. Louis and San Francisco Railway Company to Union Trust Company of New York as Trustee, to secure Trust Mortgage Five Per Cent Bonds of 1887 of said St. Louis and San Francisco Railway Company;
- (7) Mortgage or deed of trust, dated July 1, 1881, executed by St. Louis and San Francisco Railway Company to The United States Trust Company of New York as Trustee, to secure General Mortgage Five Per Cent Bonds and Six Per Cent Bonds of said St. Louis and San Francisco Railway Company;
- (8) Mortgage or deed of trust, dated July 29, 1879, executed by St. Louis and San Francisco Railway Company to Charles L. Perkins and Jacob Seligman as Trustees, to secure Missouri and Western Division First Mortgage Bonds of said St. Louis and San Francisco Railway Company;
- (9) Mortgage or deed of trust, dated September 1, 1879, executed by St. Louis, Wichita and Western Railway Company to Charles L. Perkins and Jacob Seligman, as Trustees, to secure First Mortgage Bonds of said St. Louis, Wichita and Western Railway Company;

- (10) Mortgage or deed of trust dated October 1, 1903, executed by Ozark and Cherokee Central Railway Company [fol. 577] to Continental Trust Company of the City of New York as Trustee, to secure First Mortgage Bonds of said Ozark and Cherokee Central Railway Company;
- (11) Mortgage or deed of trust, dated June 1, 1902, executed by Muskogee City Bridge Company to St. Louis Union Trust Company as Trustee, to secure First Mortgage Bonds of said Muskogee City Bridge Company;
- (12) Mortgage or deed of trust, dated January 10, 1902, executed by St. Louis, Memphis and Southeastern Railroad Company to Old Colony Trust Company and John F. Shepley, as Trustees, to secure First Mortgage Bonds of said St. Louis, Memphis and Southeastern Railroad Company;
- (13) Mortgage or deed of trust, dated October 1, 1894, executed by Pemiscot Railroad Company to Union Trust Company of St. Louis as Trustee, to secure First Mortgage Bonds of said Pemiscot Railroad Company;
- (14) Mortgage or deed of trust dated April 19, 1897, executed by Kennett and Osceola Railroad Company to Union Trust Company of St. Louis as Trustee, to secure First Mortgage Bonds of said Kennett and Osceola Railroad Company;
- (15) Mortgage or deed of trust, dated July 1, 1899, executed by Southern Missouri and Arkansas Railroad Company to Irving M. Dittenhoefer and Roderick E. Rombauer as Trustees, to secure First Mortgage Bonds of said Southern Missouri and Arkansas Railroad Company;
- (16) Mortgage or deed of trust, dated June 12, 1899, executed by Chester, Perryville and Ste. Genevieve Railway Company to Lincoln Trust Company, as Trustee, to secure First Mortgage Bonds of said Chester, Perryville and Ste. Genevieve Railway Company;
- (17) Agreement dated October 1, 1902, executed by Railway Construction and Improvement Company, Old Colony Trust Company and St. Louis and San Francisco Railroad Company to secure First Mortgage Bonds of Birmingham Belt Railroad Company;

- (18) Trust agreement, dated September 3, 1912, executed by St Louis and San Francisco Railroad Company to The Equitable Trust Company of New York, as Trustee, to secure Two Year Secured Six Per Cent Gold Notes of said St Louis and San Francisco Railroad Company;
- [fol. 578] (19) Trust agreement, dated June 1, 1911, executed by St. Louis and San Francisco Railroad Company to Old Colony Trust Company as Trustee, to secure Two Year Secured Five Per Cent Gold Notes of said St. Louis and San Francisco Railroad Company;
- (20) Trust Agreement, dated February 27, 1907, executed by The Chicago, Rock Island and Pacific Railway Company and St. Louis and San Francisco Railroad Company to Mercantile Trust Company, as Trustee, to secure First Mortgage Gold Bonds of Rock Island-Frisco Terminal Railway Company;
- (21) Equipment Trust Indenture, dated April 1, 1906, between Blair & Co., St. Louis and San Francisco Railroad Company and Bankers Trust Company as Trustee, to secure Equipment Gold Notes, Series G, of said St. Louis and San Francisco Railroad Company;
- (22) Equipment Trust Indenture, dated November 1, 1906, between First Trust and Savings Bank, Chicago, Ill., and St. Louis Union Trust Company, St. Louis, Mo., Trustees, St. Louis and San Francisco Railroad Company, and American Car and Foundry Company, to secure Equipment Gold Notes, Series I, of said St. Louis and San Francisco Railroad Company;
- (23) Equipment Trust Indenture, dated June 1, 1906, between The Pullman Company and St. Louis and San Francisco Railroad Company, to secure Equipment Gold Notes, Series J, of said St. Louis and San Francisco Railroad Company;
- (24) Equipment Trust Indenture, dated October 27, 1906, between St. Louis Union Trust Company, St. Louis, Mo., Trustee, St. Louis and San Francisco Railroad Company, and American Car and Foundry Company, to secure Equipment Gold Notes, Series K, of said St. Louis and San Francisco Railroad Company;

- (25) Equipment Trust Indenture, dated August 1, 1907, between St. Louis Union Trust Company, St. Louis, Mo., Trustee, St. Louis and San Francisco Railroad Company, and American Car and Foundry Company, to secure Equipment Gold Notes, Series L. of said St. Louis and San Francisco Railroad Company;
- (26) Equipment Trust Indenture, dated August 1, 1907, between The Pullman Company and St. Louis and San [fol. 579] Francisco Railroad Company, to secure Equipment Gold Notes, Series M, of said St. Louis and San Francisco Railroad Company;
- (27) Equipment Trust Indenture, dated July 1, 1909, between Central Trust Company of New York, Trustee, and St. Louis and San Francisco Railroad Company, to secure Equipment Gold Notes, Series N, of said St. Louis and San Francisco Railroad Company;
- (28) Equipment Trust Indenture, dated January 11, 1908, between The Provident Life and Trust Company of Philadelphia, Pa., Trustee, and St. Louis and San Francisco Railroad Company, to secure Equipment Gold Certificates, Series O, of said St. Louis and San Francisco Railroad Company;
- (29) Equipment Trust Indenture, dated October 1, 1909, between Bankers Trust Company, Trustee, and St. Louis and San Francisco Railroad Company, to secure Equipment Gold Notes, Series P, of said St. Louis and San Francisco Railroad Company;
- (30) Equipment Trust Indenture, dated August 1, 1910, between Central Trust Company of New York, Trustee, and St. Louis and San Francisco Railroad Company, to secure Equipment Gold Notes, Series Q, of said St. Louis and San Francisco Railroad Company;
- (31) Equipment Trust Indenture, dated December 1, 1910, between United States Express Company, Trustee, and St. Louis and San Francisco Railroad Company, to secure Equipment Gold Notes, Series R, of said St. Louis and San Francisco Railroad Company;
- (32) Equipment Trust Indenture, dated October 1, 1911, between Guaranty Trust Company of New York, Trustee,

and St. Louis and San Francisco Railroad Company, to secure Equipment Gold Notes, Series S, of said St. Louis and San Francisco Railroad Company;

- (33) Equipment Trust Indenture, dated September 2, 1912, between Columbia-Knickerbocker Trust Company, Trustee, and Crystal Construction Company, to secure Equipment Gold Notes, Series A, of said Frisco Construction Company;
- (34) Equipment Trust Indenture, dated September 16, 1912, between The New York Trust Company, Trustee, and Frisco Construction Company, to secure Equipment Gold Notes, Series B, of said Frisco Construction Company

[fol. 580] Article Fifth. The sale directed by this decree shall be made in the manner hereinafter in this Article prescribed.

The Special Master, unless the property embraced in the Trust Agreement of June 1, 1911, securing the Two Year Five Per Cent. Secured Gold Notes of the defendant Railroad Company shall previously have been sold in enforcement of said Trust Agreement, shall first offer said property for sale, separately and as an entirety, but subject to said Trust Agreement. The Special Master shall accept the highest and best bid received therefor and shall knock down said property to such bidder subject to confirmation of the sale by the Court.

The Special Master, unless the property embraced in the Trust Agreement of September 3, 1912, securing the Two Year Six Per Cent Secured Gold Notes of the defendant Railroad Company shall previously have been sold in enforcement of said Trust Agreement, shall next offer said property for sale, separately and as an entirety, but subject to said Trust Agreement. The Special Master shall accept the highest and best bid received therefor and shall knock down said property to such bidder subject to confirmation of the sale by the Court.

The Special Master shall next offer for sale, separately and as an entirety, the securities pledged to secure the promissory note of the defendant Railroad Company held by the complainant North American Company. The Special Master shall accept the highest and best bid received therefor and shall knock down said property to such bidder subject to confirmation of the sale by the Court.

The Special Master shall then offer for sale the remaining property of the defendant Railroad Company in the following manner, and all bids for any parcel or sub-parcel in which the same may be so offered shall be received and noted only on condition that the same may subsequently be offered as in this Article hereinafter provided:

- (a) The Special Master shall offer for sale, separately and as an entirety, all other property of the defendant Railroad Company not by this decree adjudged to be subject to the lien of either the Refunding Mortgage or the General Lien Mortgage, to wit, the property described in Article Twenty-ninth of this decree, and shall note the highest bid therefor.
- (b) The Special Master shall then offer for sale all the property by this decree adjudged to be embraced in either [fol. 581] the Refunding Mortgage or the General Lieu Mortgage and described in Article Twenty-sixth and Article Twenty-seventh of this decree. Of said property he shall first offer for sale, separately and as an entirety, the property by this decree adjudged to be embraced in the Refunding Mortgage, to wit, the property described in Article Twenty-sixth of this decree, and shall note the highest bid therefor. He shall next offer for sale, separately and as an entirety, the property by this decree adjudged to be embraced in the General Lien Mortgage, other than the property by this decree adjudged to be embraced in the Refunding Mortgage, and shall note the highest bid therefor. He shall next offer for sale, separately and as an entirety, all said property by this decree adjudged to be embraced in either the Refunding Mortgage or the General Lien Mortgage and shall note the highest bid therefor. If the highest bid received for all said property when offered for sale as an entirety shall equal or exceed the aggregate of the several highest bids therefor when offered for sale in said two sub-parcels then the Special Master shall cancel the bids noted for such sub-parcels and note only the highest bid for said property as an entirety. If, however, the highest bid received and noted for said property as an entirety shall be less than the aggregate amount of the several highest bids for said property when offered in said two sub-parcels then the Special Master shall cancel the bid noted for said property as an entirety and shall note only the highest bids for

said several respective sub-parcels. In the event that the highest bid for said property as an entirety shall equal or exceed the aggregate of the highest bids for said two sub-parcels, the purchase price and proceeds of sale of each of the two sub-parcels in which the same shall have been offered shall for the purposes of distribution and otherwise under this decree be deemed to be such proportion of the highest bid for said property as an entirety or apportionable to such property if sold with other property of the defendant Railroad Company as an entirety, as the highest bid for such sub-parcel shall bear to the aggregate of the several highest bids for said two sub-parcels when offered separately.

(c) The Special Master finally shall separately offer for sale as an entirety the property of the defendant Railroad Company specified in Article Twenty-sixth, Article Twenty-seventh and Article Twenty-ninth of this decree

and shall note the highest bid therefor.

[fol. 582] If the highest bid received for said property of the Railroad Company when so offered for sale as an enfirety shall equal or exceed the aggregate of the several highest bids therefor when offered for sale in parcels, as in subdivision (a) and subdivision (b) of this Article provided, then all said property shall be stricken off and sold as an entirety to the highest bidder therefor. If, however, the highest bid received and noted for said property as an entirety shall be less than the aggregate amount of the several highest bids for said property when offered in parcels as in subdivision (a) and subdivision (b) of this Article provided, then the several parcels offered for sale shall be stricken off and sold to the highest bidders for said respective parcels. In the event of the sale as an entirety of said property the purchase price and proceeds of sale of each of said several parcels shall for the purposes of distribution and otherwise under this decree be deemed to be such proportion of the highest bid for the property as an entirety as the highest bid for such parcel when offered for sale as a separate parcel shall bear to the aggregate of the several highest bids for said several parcels when offered for sale separately.

Article Sixth. In making the sale directed by this decree, the Special Master shall accept no bid from any one offering to bid who shall not prior to any offering by the Special Master for sale under this decree deposit with the Special Master and deliver to him as a pledge that he will make good his bid in the event of its acceptance:

A. In case of the property pledged to the complainant North American Company, the sum of \$100,000, in cash or certified check on some national bank or trust company in the City of New York or in the City of St. Louis acceptable to the Special Master and made or endorsed payable to his order; or said promissory note endorsed to the order of the Special Master or assigned to him.

B. In case of the property embraced in the Refunding Mortgage, the sum of \$500,000 in cash or certified check on some national bank or trust company in the City of New York or in the City of St. Louis acceptable to the Special Master, and made or endorsed payable to his order, or \$1,500,000 face amount of Refunding Bonds in bearer form, and if coupon bonds accompanied by the coupon of July 1, 1914, and all subsequent coupons; such deposit may be partly in cash or certified check and partly in Refunding Bonds, but in the same relative proportions.

[fol. 583] C. In case of the property embraced in the General Lien Mortgage other than property embraced in the Refunding Mortgage, the sum of \$400,000 in cash or certified check as aforesaid, or \$1,200,000 face amount of General Lien Bonds in bearer form, and if coupon bonds, accompanied by the coupon of May 1, 1914, and all subsequent coupons; such deposit may be partly in cash or certified check and partly in General Lien Bonds but in the same relative proportions;

D. In case of all the property embraced in either the Refunding Mortgage or the General Lien Mortgage as an entirety, the sum of \$900,000 in cash or certified check as aforesaid, or the aggregate of bonds of the character and to the amount as would be required under the foregoing clauses B and C in order to qualify such persons to bid for said property when offered for sale in said parcels:

E. In case of the property of the defendant Railroad Company not by this decree adjudged to be subject to the lien of either the Refunding Mortgage or the General Lien Mortgage, and specified in Article Twenty-Ninth, the sum of \$150,000 in cash or by certified check, as aforesaid, or \$1,500,000 face amount of claims against the defendant Railroad Company, heretofore presented and filed in this consolidated cause in accordance with orders heretofore made, and admitted or allowed by the Special Master to whom the same was referred, accompanied by proper and appropriate assignments thereof transferring the same to the Special Master appointed in and by this decree; such deposit may be partly in cash or certified check and partly in such claims accompanied by such assignments, but in the same relative proportions;

F. In case, as an entirety, of the property of the defendant Railroad Company specified in Article Twenty-sixth, Article Twenty-Seventh and Article Twenty-ninth, the aggregate of such sums in cash or by certified check as aforesaid or the aggregate of bonds of the character and to the amounts and claims, with assignments, to the amounts as would be required under the foregoing clauses D and E in order to qualify such person to bid for said property when offered in said parcels.

No deposit shall be required to qualify any one to bid for the properties subject to the Trust Agreement of June 1, 1911, or the properties subject to the Trust Agreement of

September 3, 1912.

In lieu of the deposit of bonds and coupons in accordance with the requirements of any of the foregoing clauses [fol. 584] B, C, D, E and F, the Special Master may accept the certificate of any national bank or trust company in the City of New York or the City of St. Louis acceptable to the Special Master that it holds subject to the order of the Special Master bonds of the required character in bearer form and, if in coupon form, accompanied by the required coupons. A deposit made by any bidder for a separate parcel or sub-parcel may, so far as applicable, be applied on account of the deposit required to be made in order to qualify him to bid for the same property when offered for sale with other property as an entirety.

Any deposit so received from an unsuccessful bidder shall be returned to him when the property shall be struck down. The deposit received from the successful bidder or bidders shall be applied on account of the purchase price of the property.

The Special Master shall not accept any bid less than

- (a) for the property pledged to the complainant North American Trust Company, the sum of \$600,000;
- (b) for the property embraced in the Refunding Mortgage, the sum of \$25,000,000;
- (c) for the property embraced in the General Lien Mortgage other than property embraced in the Refunding Mortgage, the sum of \$20,000,000;
- (d) for all the property embraced in either the Refunding Mortgage or the General Lien Mortgage as an entirety, the sum of \$45,000,000;
- (e) for the property of the defendant Railroad Company specified in Article Twenty-ninth, the sum of \$700,000;
- (f) for the property, as an entirety, of the defendant Railroad Company specified in Article Twenty-sixth, Article Twenty-seventh and Article Twenty-ninth, the sum of \$45,700,000;

and if such respective sums shall not be bid for any of said parcels nor said sum for the property, as an entirety, of the defendant Railroad Company specified in Article Twenty-sixth, Article Twenty-seventh and Article Twenty-ninth, the Special Master shall adjourn the sale of such parcel or parcels for which the required amount shall not be bidden and shall apply to the Court for further instructions in respect thereof.

[fol. 585] Article Seventh. In case any bidder upon the acceptance of his bid by the Special Master shall fail to comply, within the period of twenty days after the entry thereof, with any order of this Court requiring or relating to the payment of the balance of the purchase price, then the moneys or bonds or claims deposited by such accepted bidder, as hereinbefore provided, shall be forfeited as a penalty for such failure, and shall be applied to the payment of the expenses of a resale and toward making good any deficiency or loss in case the property in respect of payment of the purchase price of which such accepted bid-

der shall make default, shall be sold at a less price on such resale, and to such other purposes as this Court may direct.

If this Court shall not confirm any sale, the deposit made by the accepted bidder at such sale shall be forthwith returned to such bidder.

Article Eighth. The purchaser upon confirmation of the sale shall make such further payment or payments in cash on account of the purchase price as this Court may from time to time direct. So much of the purchase price as may not be required by the Court to be paid in cash may either be paid in cash or the purchaser may satisfy and make good the residue of his bid in whole or in part by turning over to the Special Master to be cancelled or credited, as hereinafter provided, the bonds and coupons to be paid out of the proceeds of sale on distribution thereof as hereinafter set forth, and claims against the defendant Railroad Company allowed and established in this cause and to be so paid. Said bonds and coupons shall be in bearer form or accompanied by proper transfers to the Special Master, and said claims shall be accompanied by proper assignments thereof to the Special Master.

In lieu of turning over to the Special Master bonds and coupons, the Special Master may accept the certificates of any national bank or trust company in the City of New York or the City of St. Louis acceptable to the Special Master that it holds subject to his order bonds of the amount and character therein specified and, if in bearer

form, accompanied by the coupons therein stated.

A purchaser shall be credited on account of the purchase price of the property by him purchased, for all bonds and coupons and for all such allowed and established claims so turned over to the Special Master in part payment of the purchase price, such sums as would be payable in respect to such bonds, coupons and claims out of the proceeds of [fol. 586] the sale if the whole amount of the purchase price were paid in cash. The Court reserves the right to resell, upon such notice as the Court may direct, property sold to any purchaser in case such purchaser shall fail or omit to make any payment on account of the unpaid balance of the purchase price within thirty days after the entry of the order requiring such payment. All sums of money and all bonds and coupons or certificates of deposit thereof and all

assignments of claims, received by the Special Master shall forthwith be deposited by the Special Master with The State National Bank of St. Louis, subject to the order of this Court.

A purchaser shall not be required to pay the amounts payable in cash, out of the proceeds of the sale to such purchaser, to holders of Refunding Bonds and the appurtenant coupon of July 1, 1914, or to holders of General Lien Bonds and the appurtenant coupons of May 1, 1914, and November 1, 1914, until ten days after this Court shall on application of the owner of any of said bonds or coupons enter its order or decree directing the payment in accordance with such order of the cash distributive share of the proceeds of any sale to which the bonds and coupons or any of them in respect of which their owner shall make application as aforesaid shall be entitled. Until a purchaser, his successors or assigns shall have paid in cash the distributive share in the proceeds of the sale to such purchaser to which any such bonds or coupons shall be entitled, either directely or in accordance with some order of this Court or into court, this Court reserves a paramount lien and charge upon the property sold to such purchaser, and every part and parcel thereof, for the payment into this Court in cash of any unpaid part or portion of the purchase price; and in case the purchaser, his successors or assigns, shall for twenty days have made default in complying with the directions of any order for such payment made by this Court upon the application of the owner of any such bonds or coupons, then this Court may retake and may resell the property sold to the purchaser who or whose successors or assigns shall so have made default, and at his or their cost and risk.

Neither any purchaser nor the successors or assigns of any purchaser shall be required to see to the application of the purchase money. The fact of purchase and the acceptance of a deed or deeds by a purchaser shall not be construed as an election to accept any contract, agreement or lease sold as part of the property offered pursuant to this decree or embraced in any deed.

[fol. 587] Article Ninth. The purchaser or purchasers of any property described in Article Twenty-sixth or Article Twenty-seventh of this decree, and his and their successors and assigns, shall, as part of the consideration for and of the purchase price of the property purchased, and in addition to the sums bid by them and elsewhere in this decree required to be paid by him or them, take such property and receive the deeds or other instruments of conveyance and transfer thereof upon the express condition that he and they, or his and their successors or assigns, shall pay, satisfy and discharge:

- (A) Any unpaid compensation which has been or shall be allowed to the Special Master heretofore appointed in this cause, or in any of the constituent causes, any unpaid compensation that has been or shall be allowed to the Receivers in this cause, or their solicitors, and also any unpaid indebtedness and liabilities of the Receivers incurred in this cause, or in any of the constituent causes, in the management or operation of the property purchased and otherwise in the discharge of their duties as such Receivers between May 27, 1913, the date of their appointment, and the date of the delivery by the Receivers of possession of the property sold:
- (B) Any unpaid claims of creditors of the defendant Railroad Company which have been or shall be admitted by the parties in interest or adjudged by this Court to be prior in lien or superior in equity to the Refunding Mortgage or to the General Lien Mortgage;
- (C) All just and legal indebtedness of the defendant Railroad Company, payment of which was authorized by the order of this Court appointing the Receivers in this cause or in any constituent cause, and which shall not at the time of delivery by the Receivers of possession of the property sold have been paid or satisfied;

to the extent that they have not been paid or shall not have been paid out of moneys in possession of the Receivers. Any surplus of said moneys remaining after payment of all the claims mentioned in the foregoing subdivisions (A), (B) and (C) shall be paid by the Receivers to the purchasers, or their assigns, or on the order thereof. In case, however, such property shall be sold in parcels, the purchaser of the property embraced in the Refunding Mortgage shall not be required to make payment of any indebtedness or liability contracted or incurred by the defendant Railroad Company prior to May 27, 1913, the date of the appointment of the Receivers unless such claim shall be adjudicated by this Court to be prior in lien or superior in equity to the Refunding Mortgage and the purchaser of [fol. 588] the property embraced in the General Lieu Mort. gage and not subject to the Refunding Mortgage shall not be required to make payment of any indebtedness or liability contracted or incurred by the defendant Railroad Company prior to the appointment of the Receivers as aforesaid unless such claim shall be adjudicated by this Court to be prior in lien or superior in equity to the General Lien Mortgage, and as between said parcels this Court will apportion liabilities to which both may be subject and charge against the proceeds of sale of the respective parcels their proper proportion of such liabilities.

The parties to receive and pay, and the amounts to be paid and received, under this Article Ninth, unless agreed upon by the parties in interest, shall be fixed and adjudged by this Court and this Court reserves the right and retains the power and jurisdiction so to do, and the right, power and jurisdiction to take back and resell any property that shall be sold under this decree in case the purchaser or purchasers, or his or their successors, shall fail to pay any of the claims mentioned in this Article Ninth when by this Court required, and in case of failure to pay any other part of the purchase price of the property sold under this decree, within twenty days after service of an order of this Court requiring such payment, or if an appeal be taken from any such order, within twenty days after service of written notice of final confirmation of such order upon appeal.

In the event that any purchaser or his successors or assigns, after demand made, shall refuse to pay any of the above-mentioned indebtedness or liabilities which under the foregoing provisions of this Article Ninth he is or may be required to pay, the person holding the claim therefor, upon twenty days' notice to such purchaser, his successors or assigns, may file a petition in this Court to have such claim enforced against the property sold to such purchaser, in accordance with the usual practice of this Court in rela-

tion to payments of a similar character; and such purchaser, his successors or assigns, shall have the right to appear and make defense to any claim, debt or demand or the priority thereof so sought to be enforced, and shall have the right to appeal from any judgment, decree or order made thereon.

Article Tenth. The Receivers shall, not more than twenty nor less than ten days prior to the date fixed for the sale under this decree of the property herein directed to be sold, file with the Clerk of this Court a statement or statements, showing as definitely as practicable,

- [fol. 589] (a) All indebtedness, obligations and liabilities contracted or incurred by the Receivers then remaining unpaid;
- (b) All unpaid indebtedness and liabilities contracted or incurred by the defendant Railroad Company prior to the appointment of the Receivers in the operation of the property directed by this decree to be sold, and which so far as they are informed are claimed to be prior in lien or superior in equity to the Refunding Mortgage;
- (c) All unpaid indebtedness and liabilities contracted or incurred by the defendant Railroad Company prior to the appointment of the Receivers in the operation of the property directed by this decree to be sold, and which, so far as they are informed, are claimed to be prior in lien or superior in equity to the General Lien Mortgage but subsequent in lien or inferior in equity to the Refunding Mortgage.
- (d) All outstanding contracts and leases (including all traffic, trackage, terminal crossing, operating and other executory contracts other than as may be specified in the General Lien Mortgage) to which the defendant Railroad Company or the Receivers may be parties, stating in the case of contracts or leases to which the defendant Railroad Company is a party whether such contracts or leases have been assumed or adopted or disaffirmed by the Receivers and to which of the lines of railroad described in Article Twenty-sixth and Article Twenty-seventh of this decree such contracts and leases are appurtenant.

(e) All claims and demands against the defendant Railroad Company which have been filed in this cause pursuant to the orders heretofore entered herein, save such as may have been paid and discharged in full.

Said statements and each of them shall be advisory only, and nothing therein contained shall be binding upon any purchaser at said sale, his successors or assigns, nor shall such statements constitute ground for release from any debt because of any representation therein or omission therefrom.

Notice having been given for the presentation in this cause of claims and demands against the defendant Railroad Company of every character and description whatsoever, and the time for the presentation of said claims having expired, no such claim or demand which has not been presented in this cause in accordance with the orders heretofore made requiring presentation thereof other than

[fol. 590] (1) any deficiency judgment which may be obtained by Guaranty Trust Company of New York as Trustee in respect of the Refunding Bonds, and by Bankers Trust Company and Neill A. McMillan, as trustees, in respect of the General Lien Bonds or by holders of Refunding Bonds, or of General Lien Bonds;

(2) any claim or demand which may arise after the entry of this decree,

shall be enforc-able against the Receivers or against the property sold, or any part or portion thereof, or against any purchaser of the same or any part thereof, his successors or assigns, nor, other than as aforesaid, shall the holder of any claim or demand not so presented be entitled to the benefits of Article Ninth of this decree nor to any right whatsoever under Article Ninth, nor other than as aforesaid, shall any claim or demand not so presented be entitled to share in the distribution of any of the proceeds of sale under this decree.

Article Eleventh. Any purchaser of the property specified in Article Twenty-sixth or Article Twenty-seventh, or of any parcel thereof, his successors and assigns, shall have the right to enter his appearance in this consolidated cause and in the appropriate separate causes heretofore consolidated into this cause and he or they or any of the parties to this consolidated cause or to the said appropriate separate causes shall have the right to contest any claim, demand or allowance existing at the time of the sale and then undetermined, and any claim or demand which thereafter may arise or be presented which shall be payable by any such purchaser, his or their successors or assigns, or which shall be chargeable against the property sold to such purchaser in addition to the amount bid at the sale, and he or they may appeal from any decision relating to any such claim, demand or allowance.

Article Twelfth. Any purchaser of the property specified in Article Twenty-sixth or Article Twenty-seventh, or of any parcel thereof, and the successors or assigns of such purchaser, shall have the right for a period of six months after the delivery of the deed or other instruments of conveyance by the Special Master of the property purchaser by him to elect whether or not to assume or adopt any lease or contract made by the defendant Railroad Company or by the Receivers, as part of the property embraced in such deed or instruments of conveyance, except the lease [fol. 591] and supplement thereto referred to in Order 66 of this cause, and, except as aforesaid, such purchaser or purchasers, his or their successors or assigns, shall be held not to have adopted or assumed any lease or contract in respect of which he or they shall not have filed written election to assume or adopt the same with the Clerk of this Court within said period of six months, or within such additional period as this Court may hereafter by its order or decree permit.

Article Thirteenth. Any purchaser of the property specified in Article Twenty-sixth of Article Twenty-seventh, or of any parcel thereof, and the successors or assigns of such purchasers, shall have the right to elect not to take or accept any part of the property so sold to such purchaser, by written notice of his election to the Special Master given at any time prior to the execution and delivery of the deed or other instruments of conveyance from the Special Master. No such election by a purchaser, his successors or as-

signs, shall diminish or affect the purchase price to be paid by such purchaser. The deed or instruments of conveyance to be given by the Special Master, the defendant Railroad Company, and the Guaranty Trust Company of New York, as trustee, and Bankers Trust Company and Neill A. McMillan, as trustees, as herein provided, shall expressly exempt therefrom any and all property which such purchaser, his successors or assigns, shall so elect not to take or accept.

Article Fourteenth. The proceeds of the sale of the securities pledged to the complainant North American Company shall be applied so far as may be requisite to the payment of the unpaid principal and interest of said note owned by it. Any excess and all other amounts arising from the sale of the property by this decree directed to be sold shall be first applied to the payment of the cost of this cause and the proper expenses attendant upon the sale, including the compensation of the Special Master appointed to make the sale, and of all allowances and disbursements of the complainant, the North American Company and its solicitors and counsel, and all expenses incurred by the Receivers in the discharge of their duties after the delivery by them of possession of the property sold, and for the purposes of determining distribution under this decree said amounts shall be apportioned and charged against the proceeds of the sale of the respective parcels in proportion to the purchase prices of such parcels.

fol. 592] A. The net proceeds of sale of the properties embraced in the Refunding Mortgage, together with any moneys which may be in the hands of the trustee under the Refunding Mortgage, shall be applied as follows:

- (1) To the payment of the costs and all charges, compensation, allowances and disbursements of Guaranty Trust Company of New York, as trustee under the Refunding Mortgage, and its solicitors and counsel.
- (2) Thereafter to the payment of the amount found by this decree to be due for principal and interest upon the Refunding Bonds and the coupons of July 1, 1914, thereunto appertaining, together with interest thereon from the date of this decree to the date fixed for the payment thereof,

at the rate of six per cent, per annum. If the funds applicable to such payment shall not be sufficient to pay in full the amount so due on the outstanding Refunding Bonds and coupons, for principal and interest, with interest thereon from the date of this decree to the date fixed for the payment thereof at the rate of six per cent per annum, then said founds applicable for the purpose shall be distributed among the holders of the Refunding Bonds and the coupons of July 1, 1914, thereunto appertaining, ratably to the aggregate amount of such unpaid principal and interest, without preference or priority of principal over interest or of interest over principal, except that no coupons, the time for the payment whereof shall have been extended, shall be entitled to share in said fund except after the prior payment in full of the amount found due for principal of all said Refunding Bonds, with interest thereon as aforesaid, and of the amount found due for the said coupons, not so extended with interest thereon as aforesaid:

- (3) Any residue shall be dealt with as the Court may direct.
- B. The net proceeds of sale of the property embraced in the General Lien Mortgage (other than by this decree adjudged to be subject to the Refunding Mortgage), together with any moneys which may be in the hands of the trustees under the General Lien Mortgage shall be applied as follows:
- (1) To the payment of the costs and all charges, compensation, allowances and disbursements of Bankers Trust Company and Neill A. McMillan, as trustees under the General Lien Mortgage, and their solicitors and counsel.
- [fol. 593] (2) Thereafter to the payment of the amount found by this decree to be due for principal and interest upon the General Lien Bonds and the coupons of May 1, 1914, and November 1, 1914, thereunto appertaining, together with interest thereon from the date of this decree to the date fixed for the payment thereof at the rate of six per cent per annum. If the funds applicable to such payment shall not be sufficient to pay in full the amount so due on the outstanding General Lien Bonds and coupons for principal and interest, with interest thereon from the date

of this decree to the date fixed for the payment thereof at the rate of six per cent per annum, then said funds applicable for the purpose shall be distributed among the holders of the General Lien Bonds and coupons of May 1, 1914, and November 1, 1914, thereunto appertaining, ratably to the aggregate amount of such unpaid principal and interest, without preference or priority of principal over interest or of interest over principal, except that

- (a) no coupon, the time for the payment whereof shall be extended, and
- (b) no coupon which in any way at or after maturity shall have been transferred or pledged separate and apart from the bond to which it relates, unless accomplished by such bond,

shall be entitled to share in said funds except after the prior payment in full of the amount found due for principal of all said General Lien Bonds, with interest thereon as aforesaid, and of the amount found due for said coupons, with interest thereon as aforesaid, other than coupons so extended, and other than coupons so transferred or so pledged, and not accompanied by the bond to which they relate.

- (3) Any residue shall be dealt with as the Court may direct.
- C. The net proceeds of the sale of other property of the defendant Railroad Company, so far as not directed otherwise to be applied, shall be applied as follows:
- (1) To the payment (a) of the claims and demands against the defendant Railroad Company which pursuant to orders of this Court have heretofore been presented in this consolidated cause or in any constitutent cause and which have been allowed and established or may be allowed and established as claims against the defendant Railroad Company and (b) the deficiency judgments, if any, which may be obtained by said Guaranty Trust Company of New [fol. 594] York, as trustee, or other trustee or trustee of the Refunding Mortgage in respect of the Refunding Bonds, and by Bankers Trust Company and Neill A. McMillan, as trustees, or other trustees of the General Lien Mortgage in

respect of the General Lien Bonds or by holders of Refund. ing Bonds or of General Lien Bonds, and (c) of any claims and demands which may arise after the entry of this decree and be allowed and established as claims against the defendant Railroad Company. Such payments shall be made ratably and proportionately among the persons whose claims or demands shall have been so presented and allowed or shall hereafter pursuant to the provisions of this decree be allowed, and to the Trustee of the Refunding Mortgage and to the Trustee of the General Lien Mortgage or bondholders obtaining deficiency judgments; subject, however, to the right of this Court hereafter, upon the application of the holder of any such claim or demand or deficiency judgment claiming a preference in law or in equity, to determine and to pass upon such preference in payment out of the fund, and in case such preference is allowed, to direct the payment of such claim or demand, in whole or in part, out of said fund in priority to claims and demands in respect of which claim for preference is not made, or if made, not allowed; and this Court reserves jurisdiction hereafter to pass upon and determine all such questions as may be presented to it in accordance with the practice of the Court. Any party to this cause or otherwise interested in the distribution of such funds in accordance with the provisions of the Clause C may appear and contest the validity or amount of any claim or demand presented pursuant to said orders of this Court and not finally passed upon by this Court before the date of sale of the property by this decree directed to be sold or of any claim or demand arising after the entry of this decree, or the validity of any alleged right of preference in respect of any claim or demand as aforsaid, and may appeal from any order or decree of this Court made in respect of any such claim or demand or asserted right of preference.

All questions relating to the amounts of compensation, charges, allowances, costs, disbursements and expenses referred to in this decree are hereby respectively reserved by this Court for further hearing and determination, and all payments to be made therefor, unless agreed upon by the parties in interest, shall be hereafter determined, fixed, al-

lowed and settled by this Court.

[fol. 595] Article Fifteenth. When the amounts payable out of the proceeds of sale upon the Refunding Bonds and appurtenant coupons maturing July 1, 1914, shall have been determined, the Special Master shall give notice of the time and place where Refunding Bonds and appurtenant coupons of July 1, 1914, may be presented for payment by publication at least once a week for three successive weeks previous to the date so fixed in a newspaper published in the City of New York, N. Y., and in a newspaper published in the City of St. Louis, Mo. The holders of Refunding Bonds and appurtenant coupons of July 1, 1914, who shall fail to present the same for payment at the time and place specified in such notice shall not be entitled to payment of any interest thereon out of the proceeds of sale after the date so fixed and of which notice shall have been given as hereinbefore provided. The Special Master may select such place for such presentation as shall be most convenient to him, either at the office of Guaranty Trust Company of New York or elsewhere, and may make any such payment either personally or through said Guaranty Trust Company of New York, or any other agent selected by the Special Master.

Article Sixteenth. When the amounts payable out of the proceeds of sale upon the General Lien Bonds and appurtenant coupons of May 1, 1914, and November 1, 1914. shall have been determined, the Special Master shall give notice of the time and place where General Lien Bonds and appurtenant coupons of May 1, 1914, and November 1, 1914, may be presented for payment, by publication at least once a week for three successive weeks previous to the date so fixed in a newspaper published in the City of New York. N. Y., and in a newspaper published in the City of St. The holders of General Lien Bonds and cou-Louis, Mo. pons thereunto appertaining of May 1, 1914, and November 1, 1914, who shall fail to present the same for payment at the time and place specified in such notice shall not be entitled to payment of any interest thereon out of the proceeds of sale after the date so fixed and of which notice shall have been given as hereinbefore provided. The Special Master may select such place for such presentation as shall be most convenient to him, either at the office of the Bankers Trust Company or elsewhere, and may make any such payment

either personally or through said Bankers Trust Company, or any other agent selected by the Special Master.

Article Seventeenth. Payments out of the proceeds of sale to holders of claims and demands against the defendant [fol. 596] Railroad Company, other than to North American Company of the promissory note held by it as provided in Article Fourteenth, and other than as provided in Article Fifteenth and Article Sixteenth, shall be made only on the further order or direction of this Court. All such payments when so authorized may be made by the Special Master personally at any place most convenient to him, or may be made through such bank or trust company in the City of St. Louis as the Special Master shall with the approval of this Court designate for that purpose.

Article Eighteenth. Upon confirmation of the sale and upon payment by any purchaser or his assigns, of the purchase price, or such portion thereof as shall pursuant to the provisions of this decree be required to be paid in advance of the delivery of the deed or other instruments of conveyance and transfer by the Special Master or upon the making by him or them of such provision for the payment thereof as this Court shall approve, the Special Master making the sale shall execute a deed or deeds or other proper instruments conveying, assigning and transferring to such purchaser or his assigns, the property sold to such purchaser: subject however, to Article Thirteenth of this decree. aforesaid deed or deeds or other instruments of conveyance or assignment or transfer shall run and be delivered to such purchaser, or at his election, to his assigns, and upon the production thereof or of a certified copy or copies thereof the grantee or grantees therein named shall be let into the possession of the property so conveyed or transferred, and shall after such delivery of possession hold, possess and enjoy the property so conveyed and transferred, and every part and parcel thereof, free from the trust and lien imposed thereon by the Refunding Mortgage and free from any trust and lien imposed thereon by the General Lien Mortgage and free from all claims, rights, interest or equity of redemption of, in or to the same by or of the defendant Railroad Company, its successors and assigns, and by or of the creditors and stockholders of the defendant Railroad

Company, and by or of all persons claiming by, under or through the defendant Railroad Company, its creditors or its stockholders: provided, however, that no sale hereunder of any property specified in Article Twenty-sixth and Article Twenty-seventh of this decree shall be confirmed to any purchaser who shall purchase said property on behalf of, or for the benefit of, any corporation organized, or to be organized, for the purpose or with the intention that it shall become the owner of said property, or any part thereof or [fol. 597] any beneficial interest therein, through any sale under this decree, pursuant to any scheme, plan or agree, ment whereby any stockholder or stockholders of the defendant Railroad Company shall receive any stock, bonds or other beneficial interest in suc, corporation on account of their stock in the defendant Railroad Company, although he or they may pay some other consideration in addition therefor, unless and until there shall have been made under or pursuant to or in connection with such scheme. plan, or agreement, to creditors of the defendant Railroad Company who have presented their claims in accordance with the orders of this Court in this cause, or in any constituent cause, and who have claims subordinate in lien and inferior in equity to the Refunding Mortgage or to the General Lien Mortgage, a fair and timely offer of cash, or a fair and timely offer of participation in such corporation through stocks, bonds or otherwise; and this Court reserves inrisdiction to determine whether such an offer to such creditors has been made under or pursuant to or in connection with any such scheme, plan or agreement, and jurisdiction to modify this decree in case it determines that no such offer has been made. The Special Master shall accept no bid from anyone who shall not, prior to any offer by the Special Master for sale under this decree, file with the Special Master a statement whether he proposes to bid on behalf of any such corporation, and if so, also file a complete statement of any such scheme, or a copy of such plan or agreement, and a statement of any offers which have been made to such creditors of the defendant Railroad Company under or pursuant to or in connection with such scheme, plan or agreement.

Article Nineteenth. The defendant Railroad Company shall at the time of the execution of any deed or deeds or instruments of conveyance, transfer and assignment by the Special Master, and by way of further assurance, deliver a similar deed or deeds or other instruments of conveyance, assignment and transfer to the grantee or grantees in such deed or instrument of conveyance of the Special Master, or if any such purchaser or his assigns, shall so request, shall join with the Special Master in the execution of the deed or deed- or instruments of conveyance, assignment and transfer to be made by said Special Master, and the defendant Railroad Company shall thereby convey, transfer, assign and release to such grantee or grantees all its right, title [fol. 598] and interest of, in and to the property so conveyed, assigned and transferred by said Special Master.

Article Twentieth. Said Guaranty Trust Company of New York, as trustee, at the time of the execution of the deed or deeds or other instruments of conveyance, assignment and transfer thereof by the Special Master, shall release to the grantee or grantees of any property embraced in the Refunding Mortgage by proper instrument, all its right, title and interest as trustee under the Refunding Mortgage of, in and to the property so conveyed, assigned or transferred.

Article Twenty-first. Said Bankers Trust Company and Neill A. McMillan, as trustees, at the time of the execution of the deed or deeds or other instruments of conveyance, assignment and transfer thereof by the Special Master shall release to the grantee or grantees, of any property embraced in the General Lien Mortgage, by proper instrument, all their right, title and interest as trustees under the General Lien Mortgage of, in and to the property so conveyed, assigned and transferred.

Article Twenty-second. In case the proceeds of sale applicable to the payment of the Refunding Bonds shall not be sufficient, when applied in accordance with the provisions of this decree, to pay in full the amount due and unpaid upon the Refunding Bonds and the appurtenant coupons of July 1, 1914, together with interest thereon at the rate of six per cent. from the date of this decree to the date fixed by the Special Master as provided by this decree, for presentation thereof for payment, then the Special Master shall report to the Court the amount of any such de-

ficiency or deficiencies, and said Guaranty Trust Company of New York, as trustee under the Refunding Mortgage, shall have judgment against the defendant Railroad Company for the amount of any such deficiency and shall have executionn therefor pursuant to the rules and practice of this Court.

Article Twenty-third. In case the proceeds of sale anplicable to the payment of the General Lien Bonds shall not be sufficient when applied in accordance with the provisions of this decree, to pay in full the amount due and unpaid upon the General Lien Bonds and the appurtenant coupons of May 1, 1914, and November 1, 1914, together with interest thereon at the rate of six per cent. per annum from the date of this decree to the date fixed by the Special Master as provided in this decree for presentation [fol. 599] for payment, then the Special Master shall report to the Court the amount of any such deficiency or deficiencies, and said Bankers Trust Company and Neill A. McMillan, as trustees under the General Lien Mortgage. shall have judgment against the defendant Railroad Company for the amount of any such deficiency and shall have execution therefor pursuant to the rules and practice of this Court.

Article Twenty-fourth. The Special Master shall make as soon as may be a report to this Court of any sale under this decree. The Special Master shall make from time to time such other reports as shall be necessary or desirable to show his action in the premises. The Court reserves the right in term or at chambers to appoint the Special Master referred to in this decree and to appoint from time to time another person Special Master under this decree, with all the powers by this decree conferred upon the Special Master in case of the death or inability to act of the Special Master first named or other appointee, or in case of the resignation of said Special Master or other appointee, or in case of failure to act or in case of removal by this Court of said Special Master or other appointee.

Article Twenty-fifth. All questions not hereby disposed of, are reserved for future adjudication. Any party to this cause and any party to any one of the separate causes consolidated into this cause and any party who has intervened in this cause or in any constituent cause may at any time apply to this Court for further relief at the foot of this decree; and this Court reserves jurisdiction to determine all issues of law and fact raised under the intervening petitions of The Kansas City Southern Railway Company, The Kansas City Terminal Railway Company, Illinois Trust and Savings Bank; Atchison, Topeka and Santa Fe Railway Company, The Missouri Pacific Railway Company; Chicago, Burlington & Quincy Railroad Company, Chicago & Alton Railway Company, Chicago Great Western Railway Company, Chicago, Milwaukee & St. Paul Railway Company, The Wabash Railway Company, Union Pacific Railroad Company and Kansas City Southern Railway Company; and Fort Smith & Van Buren Railway Company and Kansas City Southern Railway Company, and any amendment or supplement thereto which this Court may permit to be filed herein, and to enforce such determination with like effect as if such adjudication had been had prior to the entry of this decree; and any sale or purchase under this decree shall be subject to such enforcement of such adjudication.

[fol. 600] Article Twenty-sixth, The Refunding Mortgage is a lien on the following properties subject as stated in Article Fourth of this decree:

"Here follows detailed description of property covered by the Refunding Mortgage."

Article Twenty-seventh. The General Lien Mortgage is a lien on the following properties, subject as stated in Article Fourth, and as to such part thereof as is by this decree adjudged to be embraced in the Refunding Mortgage and is described in Article Twenty-sixth of this decree, to the lien of the Refunding Mortgage:

"Here follows detailed description of property covered by The General Lien Mortgage."

The Receivers shall, not less than twenty days prior to the date fixed for the sale under this decree of the property by this decree directed to be sold, file with the Clerk of this Court a statement or statements describing by metes and bounds the properties specified in Clause I of this Article, stating the names in which such properties are held and specifying by the name of the grantor and the place of record the deeds under which such properties have been acquired. Such statements shall be advisory only and nothing therein contained shall constitute ground for the release of any purchaser because of any representation therein nor omission therefrom.

Walter H. Sanborn, United States Circuit Judge.

Mr. Murphy: Mr. Cowan, from the inception of this litigation before the Interstate Commerce Commission down to the present date have you done everything possible to expedite the hearing of these cases?

Mr. Miller: I must object to that because that is purely

a conclusion that you are calling for.

The Master: I think that that is a conclusion. You may show the different steps you have taken in the matter. I will permit him to testify as to what he did toward the final adjudication of these claims within the period named in which to present claims. (p. 52)

[fol. 601] A. We did everything possible at all stages in the presentation of the various phases of these cases to expedite and bring the matter to a speedy conclusion.

Mr. Murphy: I think that is all, Mr. Miller.

Thereupon the defendant offered the following evidence:

Mr. Miller: We offer in evidence the interlocutory decree, being order No. 98 in this cause, and it refers specifically to section 19 on pages 17, 18 and 19 of the copy of the decree, with the privilege to either of the parties to offer any other portions.

Mr. Saunders: What is the purpose of that offer, Mr.

Miller?

Mr. Miller: Just as to the filing of the claims here.

Mr. Saunders: I submit we are not bound in any manner by that. We are not a party to those proceedings. At that time the claims were being contested by the railroad company. We submit if it is offered for the purpose of showing that the prosecution of these claims was not barred by the interlocutory order, it is incompetent and immaterial for that purpose.

The Master: In order to get the whole record before Judge Sanborn, I will overrule the objection and admit it.

To which ruling of the Master the intervenors then and there duly excepted and still except.

Said interlocutory decree, order No. 98, is in words and figures as follows, to-wit:

## DEFT. Ex. 1

IN THE DISTRICT COURT OF THE UNITED STATES WITHIN AND FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI

## No. 4174. In Equity

NORTH AMERICAN COMPANY, Complainant

VS.

St. Louis & San Francisco Railroad Company, Defendant

## Consolidated Cause

## Interlocutory Degree

This cause came on for hearing on this 29th day of May, 1914, upon bill and answer, pursuant to stipulation, and upon petition of the Receivers and motion of the complain-[fol. 602] ants for an order prescribing the time within which creditors may prove their claims against the estate herein, and upon consideration thereof, it is

Ordered, adjudged and decreed as follows: \* \* \*

That all of the property of said defendant, St. Louis and San Francisco Railroad Company, whether at law or in equity, whether in action or in possession, and wherever situated, be, and the same is, hereby, sequestrated and set apart to pay the just debts and obligations of the defendant, and the Receivers herein are hereby directed and empowered to hold, operate and apply the same to that purpose

pursuant to the orders and decrees of this Court. That in case the said debts are not paid by said Receivers or by said defendant, the property of the defendant be sold at such time or times, in such quantities and in such manner as shall be subsequently adjudged herein, and that the proceeds of such sale or sales be applied to the payment of said debts.

And it is further ordered, adjudged and decreed that the holder or holders of any claim, claims or demands or obligations of or against said defendant, St. Louis and San Francisco Railroad Company, and all persons who claim any interest in or lien upon any of the funds or property in the hands of said Receivers, as creditors of said defendant, or in any other way, file verified statements of the natures. dates of accrual and amounts of their respective claims and demands and obligations, with Thomas T. Fauntlerov, Spe. cial Master, at St. Louis, in the State of Missouri, on on before the first day of October, 1914, and if any of them fail so to do, they and each of them so failing shall be barred from sharing in the benefit of the distribution of the moneys and proceeds of the property of said defendant. St. Louis and San Francisco Railroad Company, that now are or hereafter shall be in the hands of the Receivers in this case, and from sharing or participating in the benefits of any distribution of the proce-ds arising from the sale of said railroad and other property, if such sale shall hereafter be adjudged and decreed in this cause. Claims shall be proved on the basis of allowance of interest to May 27, 1913, the date of the appointment of the Receivers herein, without prejudice to the right of the creditors to demand and receive interest accruing thereafter upon the amounts found to be due to said creditors respectively on said 27th day of May, 1913. Any party to this suit and any party who files his claim or demand or obligation in accordance with this order, and the Receivers, may file an answer to [fol. 603] the claim or demand or obligation of any party herein with said Special Master within thirty days after October first, 1914, and may contest the same. All claims and demands and obligations so filed are hereby referred to said Special Master for him to report the amounts justly owing thereon and the order in which they are lawfully entitled to payment. The Special Master shall make and

file, in writing, his report on each and every such claim or demand or obligation which he may hear and adjudicate. Any party to such claim or demand or obligation, or other interested party herein, who feels aggrieved at the decision of the Special Master may, within 20 days from the time of the filing of such report of the Special Master, file exceptions thereto, and no exception not so filed will be considered by the Court, and if no exception is within that period filed by any such party, the report shall stand confirmed. The Special Master herein shall cause that portion of this decree relating to the presentation and allowance of claims to be published forthwith, once each week, for six successive weeks, in a newspaper of general circulation published in the City of St. Louis, State of Missouri; in a newspaper of general circulation published in the City of Memphis, State of Tennessee; in a newspaper of general circulation published in the City of Birmingham, State of Alabama; and in a newspaper of general circulation published in the City of New York, State of New York.

Jurisdiction to make any and all further orders and decrees fit in this suit or proceeding is hereby expressly re-

served.

Walter H. Sanborn, Circuit Judge,

Dated this 29th day of May, 1914. Filed June 1, 1914. W. W. Nall, Clerk.

Mr. Miller: I ask if the intervenors will admit that publication of the portion of the interlocutory decree relating to the presentation of claims, as provided in section 19, in the City of St. Louis, Mo.; Memphis, Tenn.; Birmingham, Ala., and in the City of New York, the decree providing that the Special Master shall cause such publication of claims-I ask if you will admit that publication was made.

Mr. Murphy: We will admit that, but we won't admit that

publication was made in the State of Texas.

Mr. Miller: All I know as to that is that publication was made in the places provided here and not elsewhere. [fol. 604] Mr. Murphy: Suppose we make that admission

subject to objection.

Mr. Miller: That is all right.

The Master: That will be admitted subject to the objection.

Mr. Miller: We introduce in evidence the order discharging the receivers, and I ask if you will admit the first paragraph on page three of the printed copy requiring the purchaser to cause notice of the contents of the order to be published in daily newspapers published in the cities of Birmingham, Ala.; Memphis, Tennessee and St. Louis, Missouri, that notice was published as required in that order?

Mr. Murphy: Subject to the objection, we will admit that, and so far as you know, no notice other than that was

published?

Mr. Miller: I know of no notices other than that.

The Master: That will be received subject to objection.

Said order discharging the receivers is in words and figures as follows, to-wit:

(Said order omitted here as same is identical with Intervenor's Ex. 18.)

At this point counsel for intervenors admitted, subject to the said objections that have been made by them, that as to the order made by the Court permitting the filing of claims by intervenors, and others made by the court upon individual claims within any fixed time, that the last and final order was made by the Court to expire on February 1, 1916 (p. 55).

Said objections were by the Master overruled; to which ruling, intervenors by counsel duly excepted and still except.

Counsel for defendant at this point offered in evidence the order dated May 5, 1915, filed May 8, 1915, extending the time for filing claims under the interlocutory order to June 1, 1915; the order dated August 25, 1915, filed August 27, 1915, extending the time of filing claims under the interlocutory decree to November 1, 1915; the order filed January 24, 1916, extending time for filing claims under the interlocutory order to February 1, 1916,

To each of said offers counsel for the intervenors objected for the reason that they were not bound in any man-[fol. 605] ner by said orders, that they were not a party to those proceedings; that at that time their claims were being contested by the railroad company; and that if they are offered for the purpose of showing that the prosecution of their claims was barred by the interlocutory order, they are incompetent and immaterial for that purpose.

The Master: It will be received subject to the objection.

To which rulings of the Special Master, intervenors then and there duly excepted and still except. (p. 55).

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EAST-ERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MIS-SOURI

NORTH AMERICAN COMPANY, Complainant,

VS.

St. Louis & San Francisco Railroad Company, Defendant.

In the Matter of the Intervening and Supplemental Intervening Petitions of E. B. Spiller et al. Intervening Petition No. 402.

In the Matter of the Intervening and Supplemental Intervening Petitions of E. B. Spiller. Intervening Petition No. 403

Consolidated under the Style

"In the Matter of the Interventions of E. B. Spiller et al. Consolidated Cause Final. No. 4174

STIPULATION TO OMIT CERTAIN ORDERS OFFERED IN EVIDENCE AND STATEMENT RELATIVE THERETO—Filed August 26, 1924

It is Hereby Stipulated and Agreed by and between the above named intervenors and the St. Louis & San Francisco Railroad Company, and the St. Louis-San Francisco Railway Company, parties herein, that the Clerk of this court may omit from the transcript of the record and proceedings in this cause to be filed in the United States Circuit Court of Appeals, for the Eighth Circuit, the orders offered in evidence before the Special Master, by the de-

fendant and filed under date of May 8, 1915, August 27, 1915, and February 1, 1916, respectively, extending the time for filing claims under the interlocutory decree, and that the Clerk of this court may substitute in lieu thereof the

following statement:

The order dated May 5, 1915, made by Honorable Walter H. Sanborn and filed May 8, 1915, in consolidated cause [fol. 606] final, No. 4174, In Equity, North American Com. pany, complainant, vs. St. Louis & San Francisco Railroad Company, defendant, ordered that the time fixed by the interlocutory decree herein of May 29, 1914, within which verified statements of the natures, dates of accrual and amounts of claims, demands and obligations against the St. Louis & San Francisco Railroad Company, may be filed. be extended to June 1, 1915. The order dated August 25. 1915, and filed August 27, 1915, ordered that the time for presenting claims against the St. Louis & San Francisco Railroad Company be extended to November 1, 1915. The order filed January 24, 1916, ordered that the time for presenting claims under the interlocutory order be extended to February 1, 1916.

(Sgd.) John S. Leahy, Walter H. Saunders, D. A. Murphy, S. H. Cowan, Attorneys for Interveners. W. F. Evans, E. T. Miller, Attorneys for St. Louis & San Francisco Railroad Company and St. Louis

San Francisco Railway Company.

August 25, 1924.

At this point, counsel for intervenors admitted, subject to the foregoing objections, upon the statement of counsel for defendant, that in an order dated May 25, 1917, filed May 28, 1917, provision was made for filing claims against the receivers, and that order provided that the Special Master may when requested by either of the parties in interest, cause that portion of the order to be published once a week for three consecutive weeks in a newspaper of general circulation in the Cities of St. Louis, Missouri, Memphis, Tennessee; Birmingham, Alabama, and the City of New York, New York, and that the notices were published as provided by that order (p. 56).

Mr. Murphy: That is admitted, subject to the objection. It is admitted that all of these intervenors are citizens and residents of the State of Texas, is it not?

Mr. Miller: You mean Mr. Spiller?

Mr. Murphy: Yes.

Mr. Miller: If Mr. Spiller says he is, that is enough.

[fol. 607] Mr. Murphy: Mr. Spiller, are all these intervenors here citizens and residents of the State of Texas, and have they been during the entire course of this litigation?

Mr. Spiller: No, not all of them are citizens and residents of Texas, some of them are in Oklahoma.

Mr. Murphy: But you have been a citizen and resident of the State of Texas, all the time?

Mr. Spiller: Yes (p. 57).

Mr. Miller:

Q. Are none of them residents of any other state but Oklahoma or Texas?

Mr. Spiller: Well, there might be some of them that live in other states.

Mr. Murphy: But you know that most of them live in Texas or in Oklahoma?

Mr. Spiller: I know positively that most of them live in Oklahoma and Texas. There might be an occasional one that is a resident of some other state.

Mr. Murphy: Mr. Spiller, did you ever have any knowledge of any orders made by the court relative to the time within which claims could be filed?

To which question counsel for defendant objected on the ground that the law presumes that they did have notice, which objection was by the master overruled; to which ruling counsel duly excepted and still except.

Mr. Spiller: No, I never knew that.

In answer to question put by counsel for interveners, whether he had any notice or knowledge of any such order after his examination of the record, Mr. Cowan replied that he had no notice; whether he had knowledge of them, he did not know about that; that he had no notice relative to any particular order; that he did not know of any order made.

He knew of the appointment of the Receivers; he has been practicing law for a number of years, and has had many receivership suits in his law practice; he knows that in receivership suits, generally speaking, it is the usual procedure that orders are made from time to time by the court fixing the time for filing claims against insolvent corporations.

It was admitted for the purpose of the record, that the petition in case No. 4320 contained the same allegations as the [fol. 608] petition in case No. 4308, with exception as to

parties and amounts (p. 59).

At this point, counsel for interveners offered in evidence, copy of Judge Sanborn's opinion, permitting the intervention to be filed.

To which offer and question counsel for defendant objected for the reasons aforesaid; which objections were overruled, to which ruling the Special Master, said defendant, then and there duly excepted and still except.

Said opinion of Judge Sanborn is in words and figures

as follows, to-wit:

(Said opinion omitted here as same is attached to order granting leave to Spiller to file intervening petition, hereinbefore set out.)

Thereupon, the hearing was adjourned, date to be thereafter agreed upon.

Pursuant to adjournment, on Saturday December 10, 1921, the hearing was resumed before the Special Master. Further evidence was offered on behalf of defendant, as follows:

Counsel for defendant offered in evidence, the petition filed in the Federal Court at St. Louis, Missouri, on January 11, 1915, wherein these interveners were plaintiffs and the railroad company was defendant, the answer filed April 12, 1915, and the reply filed April 15, 1915, covering the same claims that are involved in this intervention, with the exception of the claim against the receivers, for attorney's fees; said cause being dismissed for want of prosecution March 17, 1917, being reinstated on application of the plaintiffs on March 22, 1917, and being finally dismissed for want of prosecution on November 6, 1918.

Mr. Murphy: We object to the introduction of each and all of the papers offered and to the testimony relative to the dismissal of the petition for want of prosecution, for the reason that each and all of the papers offered are irrelevant and immaterial.

The Master: Well, I am going to receive all of the testi-

mony subject to objection.

To which ruling of the Master the interveners then and there duly excepted and still except.

Said papers, Defendant's Exhibit 6, 6a and 6b are in words and figures as follows, to-wit:

[fol. 609]

Deft. Ex. 6

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION, AT ST. LOUIS

No. 4393

E. B. SPILLER, Plaintiff,

VS.

St. Louis & San Francisco Railroad Company, a Corporation, Defendant

Plaintiff's Original Petition

Cowan & Burney, Fort Worth, Texas; B. F. Deatherage, Kansas City, Mo.; James A. Seddon, St. Louis, Mo., Attorneys for Plaintiff.

To the Honorable Judge of said Court:

T

E. B. Spiller, plaintiff, who resides in Tarrant County, in the Northern District of Texas, at Fort Worth, complaining of the defendant, St. Louis & San Francisco Railway Company, which owns and operates its line of railway through the Eastern District of Missouri and has a principal operating office in said District at Kansas City, Missouri; represents:

That the defendant is now and at the dates herein named was a common carrier engaged in the transportation of cattle in connection with other lines of railway from points in Texas, Oklahoma and New Mexico to Kansas City and St. Joseph, Missouri, St. Louis, Missouri, National Stock Yards and Chicago, Illinois, and to other live stock markets, and was a party to the tariffs of rates, fares and charges constituting joint rates and through routes, from the points named in Appendix A to the order of the Interstate Commerce Commission herein referred to and made a part hereof, as Exhibit to this petition, at the rates of freight shown in said Appendix A.

#### III

That on the 12th day of January, 1914, the Interstate Commerce Commission, after full hearing and in all things [fol, 610] proceeding legally, in the cause pending before it, being No. 732, Cattle Raisers Association of Texas et al. vs. Missouri, Kansas & Texas Railway Company et al., in which all of the carriers herein named were parties, made its lawful order directing the defendant and each of the carriers named in said order to pay to the plaintiff damages on account of charging said shippers named as consignors in said report and order unjust and unreasonable rates on shipments of cattle shown in said Appendix A in the amounts therein named, said report and order of the Commission being Unreported Opinion No. A-583 hereto attached and made a part hereof as Exhibit A in which the unreasonable rates paid, the rates established by the Commission, the shipments made for which the unreasonable rates were paid, the amount of principal and interest as damages which the defendant and other carriers therein named were directed severally to pay to plaintiff, are fully set out in connection with the findings in said Supplemental Report and order of the Commission, and in which amounts the shippers named as consignors, who assigned their claims to plaintiff, as therein shown, were damaged by the defendant as found by the Commission, and which the plaintiff as assignee as stated in said

report of the Commission is entitled to recover of said defendant, St. Louis & San Francisco Railway Company,

principal \$20,211.95, interest \$7,470.80.

The detailed claims and amounts sued for herein being for and on account of the shipments made and freight paid to the defendant St. Louis & San Francisco Railway Co., by said consignors named in said order and appendix thereto, where the name of the consignor is followed by the letter S and those followed by the letter C and also under which the abbreviation of the word ditto is used (Do), meaning a repetition of the preceding line, name and letter indicating to whom the assignment was made as shown by said Report and order of the Commission and explained by notation on page 5 of the Appendix thereto, to recover each and all of which claims and interest which the Commission by said order directed the St. Louis & San Francisco Kailway Company to pay to plaintiff the plaintiff sues the said defendant.

### IV

That the damages so claimed grew out of the fact that in the year 1903, the defendant and other Railway Companies in said cause 732 and their connecting carriers being engaged in the business of transporting cattle from said points of origin mentioned in said Appendix A to the markets of destinations as shown in said Appendix, on or about [fol. 611] March, 1903, advanced the rates for transporting cattle from said points of origin named in said Appendix A, and from other points, to Kansas City, St. Joseph and St. Louis, Missouri; National Stock Yards and Chicago, Illinois; New Orleans, Louisiana, and other points, the amount of the advance applicable to shipments therein specified being the difference between the rates shown in the column of Appendix A marked "Rate paid" and in column marked "Rate ordered," which "Rate paid" named in said Appendix A the shippers named as consignors in said list were compelled severally to pay to the said carriers respectively as shown in said Appendix A on the shipments which they respectively made, as therein shown, which advanced rates were found by the Commission to be unjust and unreasonable, and on account of the payment of which on the said shipments, said carriers were ordered and directed to pay the said principal sum and interest to plaintiff as assignee of the said shippers named as consignors, as shown in said report and order of the Commission, Exhibit A hereto.

That after said rates were advanced and on February 10. 1904, the Cattle Raisers Association of Texas, a voluntary organization of live stock producers and shippers of Texas. Oklahoma and New Mexico, brought its complaint before the Interstate Commerce Commission against the said carriers, and other carriers and their connecting lines of railway which had established said rates, alleging that said advanced rates were unjust and unreasonable, and the Commission, after full hearing of said complaint, in accordance with the Act to Regulate Commerce, on August 16, 1905, he its report and opinion in Cause No. 732, Cattle Raisers Association of Texas et al. vs. M. K. & T. Ry. Co. et al., reported in 11 I. C. C. 298, found it to be a fact that said advanced rates were unjust and unreasonable and in violation of Section 1 of the Act to Regulate Commerce, as shown by the report of the Commission in said cause last above referred to, which report and opinion as published by the Interstate Commerce Commission is hereby referred to and plaintiff asks that it be considered a part hereof. That said advanced rates, notwithstanding the said decision of the Commission, remained in effect until November 17, That while the Commission found, as shown in its said report and opinion, that the said rates on cattle were advanced as aforesaid, and the advances thereof were unjust and unreasonable, no formal order was made by the Commission consequent upon its said report and opinion, [fol. 612] because the complainant, the Cattle Raisers Association, upon the promulgation of that report and opinion, made application to the Commission for more specific findings of fact, which application had not been decided or disposed of, but held under advisement by the Commission until the Act to Regulate Commerce was amended by what is known as the Hepburn law, effective August 28, 1906, and which application for more specific findings of fact was still pending before the Commission on August 29, 1906.

That on August 29, 1906, the complainant in behalf of itself and its members and others similarly situated, who were engaged in the business of raising, buying and ship-

ping cattle from the states of Texas, Oklahoma and New Mexico and Colorado over said lines of railway, to the markets shown as points of destination in said Appendix A hereinbefore referred to, filed its petition with the Interstate Commerce Commission reaffirming its previous allegations of its petition filed with the Commission February 10, 1914, charging that the rates on cattle from the points hereinbefore mentioned to the destinations mentioned, and the advances in said rates, and the rates advanced, were minst and unreasonable, and praying that the Commission should proceed with such further hearing as it might deem necessary with respect to the allegations that the said rates were unjust and unreasonable, and for an order of the Interstate Commerce Commission prescribing the just and reasonable rates and praying for an order of reparation against the defendants respectively on behalf of the members of the Cattle Raisers Association of Texas, as shippers, and others similarly situated, for their respective damages accruing by reason of the payment of said unjust and unreasonable rates.

That thereupon the Interstate Commerce Commission, after answers duly filed by all the said defendants herein and their connecting carriers, proceeded to a full hearing of the matters contained in said petition, and after such full hearing as provided by law, the Interstate Commerce Commission on April 14, 1908, by its Report and Opinion, 13 I. C. C. 419, in said cause, found that said rates as advanced and the advances of said rates were unjust and unreasonable, as found in the previous opinion of the Commission as above referred to, reported in 11 I. C. C. 298, the finding of the Commission in its report of April 14, 1908, being in part as follows:

"It is our opinion, therefore, that the advances shown in the appendix to our former report, which is referred to and [fol. 613] made a part of this report, which were effected by the defendants during the year 1903, were unjust and unreasonable; that the present rates produced by those advances are unjust and unreasonable; that the rates in effect previous to said advance would be just and reasonable and ought not to be exceeded for the future."

The report and opinion of the Interstate Commerce Commission as shown by the official report in said cause, 13

I. C. C. 419, is here referred to and complainant asks that the same be taken as a part hereof. That in said report and opinion the Commission reserved for further consideration the matter or reparation when the specific claims there.

after should be presented.

That the Commission, in its said last named report, and by supplemental order in said cause, prescribed and fixed the reasonable rates for shipments of cattle from the points of origin named in said Appendix A hereinbefore referred to, to the destinations therein named, being the same rates designated therein as "rate ordered," which became effective November 17, 1908.

V

That the said parties named as consignors in said Appendix A above referred to, being the owners thereof, shipped the carloads of cattle as therein shown, from the points to the destinations shown in said Appendix A and paid to defendant, the rate of freight named in the column marked "Rate paid," which rates as aforesaid were held by the Commission to be unjust, unreasonable and unlawful at the dates of said shipments, in the amounts as named in said Appendix A and that said owners as shippers and consignors were thereby damaged by defendant in the amount of the unjust and unreasonable part of the rates as shown by the difference between "Rate paid" and "Rate ordered," as shown in Appendix A, under the heading St. Louis & San Francisco Railway Company, pages 52 to 62. the aggregate damages against said defendant to which plaintiff is entitled being, principal \$20,211.95, interest \$7,470.80. The rate paid was as aforesaid found by the Commission to be unjust and unreasonable and the rate ordered was found to be the just and reasonable rate applicable to such shipment, when made.

## VI

And plaintiff alleges that the facts as found by the Commission in said reports and opinion are true and correct. [fol. 614] That said shippers named in said Appendix as consignors, and E. B. Spiller, as secretary of the Cattle Raisers Association of Texas, and his predecessor in office, H. E. Cowley, in due time and in accordance with law, filed

and caused to be filed with the Interstate Commerce Commission for and on account of the shippers named as consignors, and on account of said Spiller and Crowley as assignees for and on account of said shipments and freight paid, their petitions and claims for reparation for the amount of said unlawful charge which the Commission by its said report and order of January 12, 1914, Exhibit A hereto, directed the defendant to pay. That the said claims and the rights of the said owners as shippers and consignors as aforesaid were duly and legally assigned to E. B. Spiller, as shown in the report and order of the Commission. Exhibit A hereof, so that he became and was, at the date of said order, and now is, the legal and equitable owner and holder thereof and entitled to have and recover the damages resulting to said shippers by reason of the premises, and as such was entitled to have the order of the Interstate Commerce Commission as aforesaid ordering and directing the said carriers in said cause to pay principal and interest, together with interest thereon, and is entitled to recover the same as awarded against the St. Louis & San Francisco Railway Company, together with interest and attorneys' fees as provided by law.

That the said order of the Interstate Commerce Commission, Exhibit A hereof, directing the railroads therein named to pay the aforesaid damages as therein shown, was duly served upon the defendant herein, but though often requested that said defendant has failed and refused and still fails and refuses to pay the same or any part thereof, and therefore is liable to the plaintiff in the full amount of said damages, principal, interest and attorneys' fees.

### VII

Wherefore, premises considered, the plaintiff prays for citation in due form and on final hearing for judgment for the aforesaid damages against the St. Louis & San Francisco Railway Company as awarded against that Company, interest, costs and attorneys' fees, and in duty bound will ever pray.

#### Second Count

And the plaintiff, E. B. Spiller, reaffirming and adopting the foregoing allegations, and adopting Exhibit A thereto as Exhibit A to this count, and making reference to the said allegations and Exhibit as a part of this count of this petition, and complaining of the said defendant, the St. Louis [fol. 615] & San Francisco Railway Company, and for cause of action against said Company and suing for treble damages under the anti-trust laws of the United States, to-wit, 26 Statute at Large 209-210, Act of July 2, 1890, and 28 Statute at Large 570, further alleges:

The St. Louis & San Francisco Railway Co. owns and operates its line of railway through the western district of Missouri and is to be found in said district.

That on or about March 3, 1903, the aforesaid defendant St. Louis & San Francisco Railway Company in combination and conspiracy with the Missouri, Kansas & Texas Railway Company, the Missouri Pacific Railway Company, the St. Louis & San Francisco Railway Company, the Atchison, Topeka & Santa Fe Railway Company, the Chicago, Rock Island & Pacific Railway Company and the Chicago & Alton Railway Company, the St. Louis, Iron Mountain & Southern Railway Company, the Chicago & East Illinois Railway Company, the Illinois Central Railroad Company, the Gulf, Colorado & Santa Fe Railway Company, the Missouri, Kansas & Texas Railway Company of Texas, the St. Louis, San Francisco and Texas Railway Company, The Fort Worth and Rio Grande Railway Company, The Fort Worth and Denver City Railway Company, The Colorado and Southern Railway Company, The Texas Central Railway Company, The Houston and Texas Central Railway Company, The International and Great Northern Railway Company, the Texas Midland Railway Company, The Galveston, Harrisburg and San Antonio Railway Company, the St. Louis Southwestern Railway Company of Texas, The San Antonio and Arkansas Pass Railway Company, The Wichita Valley Railway Company, and all other railroad companies operating at that time in Texas, Oklahoma, New Mexico and Colorado, engaged in the through transportation of cattle from said points of origin to said points of destination, parties defendant to said cause 732, before the Interstate Commerce Commission, by their said acts, combination and conspiracy in violation of law, in restraint of interstate commerce as to the rates of freight on the shipments made as herein referred to, by the

advances of the said rates, imposed upon all shippers, and particularly those mentioned as consignors in said Appendix A, said unreasonable rates, maintained the same and charged said rates on the said shipments as shown in said report and order of the Commission hereto attached as Exhibit A.

[fol. 616] That the combination and conspiracy consisted of the said defendant and said connecting and other carriers, on or about March 3, 1903, coming together by their representatives and by means of personal communication and by correspondence, to establish and publish freight rates on cattle and other live stock as well as on the other commodities by joint tariffs of rates, to which all of said defendants were parties, and by tariffs issued by the individual lines from their own stations and individual lines and their connecting lines where two or more lines participated in such transporation and by the joint tariffs of all of said defendants; said rates applying from said points of origin named in said Appendix A aforesaid to the destinations therein named, and were the rates named in the column headed "rate paid."

That defendant and all of said carriers and the others in combination and conspiracy with each other put into effect said rates as joint and several rates and maintained them in restraint of interstate commerce in cattle, shipped from said points of origin to said destination, and by virtue of the said combination and conspiracy eliminated all competition in said rates, and advanced the same as found by the Interstate — Commission in its said supplemental report and order, Exhibit A hereto, as shown by the difference in the "rate paid" and "rate advanced" as shown in said Appendix A, which advance was unjust, unreasonable and unlawful, and an unlawful restraint of interstate commerce, and were by combination and conspiracy continued in force by defendant down to November 17, 1908.

That the parties named in said Appendix A made the shipments and paid said unlawful rates as therein shown and consequently were damaged in their business and property to the extent of the difference in said rates and the rates ordered as shown in said Appendix A, in the aggregate amount and interest as shown by the finding of the Commission aforesaid; and that said Consignors so dam-

aged assigned their claims for damages to plaintiff as shown in said Supplemental Report and Order of the Commission attached hereto as Exhibit  $\Lambda$ , as a part hereof, so that plaintiff is entitled to all the rights of the said injured parties, and is therefore damaged by virtue of the premises in his business and property in said amounts, for all of which defendant is liable to plaintiff, and which said defendant has failed and refused and still refuses to pay.

That said parties so damaged were entitled to treble damages and that plaintiff as assignee is entitled to recover [fol. 617] the same, jointly and severally, together with in-

terest, costs and attorneys' fees.

The plaintiff, therefore, prays citation, and on final hearing for his aforesaid damages, interest and costs and for reasonable attorneys fees, and for general relief.

Cowan & Burney, Fort Worth, Texas; B. F. Deatherage, Kansas City, Mo.; Jas. A. Seddon, St. Louis, Mo., Attorneys for Plaintiff.

Fort Worth, Texas, —, 1914.

State of Texas, County of Tarrant:

Before me, the undersigned authority, this day personally appeared E. B. Spiller, plaintiff in the above case, who being by me duly sworn stated upon his oath that the allegations of the foregoing petition are true and correct.

(Signed) E. B. Spiller, Plaintiff.

Subscribed and sworn to before me this the 5th day of January, 1915. (Signed) M. E. Griffiths, Notary Public. (Seal.)

## DEFT. Ex. 6A

In the District Court of the United States within and for the Eastern Division of the Eastern District of Missouri.

No. 4393

E. B. SPILLER, Plaintiff,

VS.

St. Louis and San Francisco Railroad Company, Defendant

#### Answer

Comes now defendant, and for its answer to the first count of the petition filed herein, states:

#### I

Defendant admits that it is a corporation, that its lines of railway extend through the Eastern District of Missouri, [fol. 618] and that its principal place of business is in the City of St. Louis, Missouri.

## II

Defendant further admits, that at all the times mentioned in the petition, it was a common carrier engaged in the transportation of cattle in connection with other lines of railway between the points in said petition mentioned, and that it was a party to the tariff of rates and charges constituting joint rates from the points named in Appendix A attached to said petition, in so far as the same refers to the defendant.

#### III

Defendant further admits, that on January 12, 1914, the Interstate Commerce Commission, in Cause No. 732 pending before it, of the Cattle Raisers' Association of Texas vs. Missouri, Kansas and Texas Railway Company, et al., made an order directing this defendant to pay to the plaintiff certain moneys claimed to have been unreasonable rates paid by shippers of cattle to this defendant for transportation of live stock, with interest, but it denies that said

order of the Interstate Commerce Commission was unlawful, and denies that defendant collected unjust or unreasonable rates on shipments of cattle referred to in Appendix A of Exhibit A to said petition; and denies that the rates charged and collected by it were unjust or unreasonable, and denies that any shippers of live stock mentioned in said Appendix A of Exhibit A were damaged by reason of the rates collected by the defendant, or that plaintiff was damaged by reason thereof; but on the contrary, defendant avers that the plaintiff had no right or authority to obtain from said Interstate Commerce Commission as assignee of such alleged shippers, an award of reparation, and said Interstate Commerce Commission was without jurisdiction or authority to entertain any such alleged complaint, or to make the alleged award to said plaintiff as assignee.

Defendant further avers, that any shipments made by any shippers or consignors referred to in Appendix A over the line of the defendant, were under the regular and lawful tariff rates of the defendant in force at the time, which rates were just and reasonable, and which rates were voluntarily and without objection paid by the parties making such shipments, and that the schedule of alleged shipments set out in Appendix A is in many respects erroneous, and

without foundation in fact.

[fol. 619] IV

Defendant admits that on or about March, 1903, it advanced the rates for transporting cattle from points of origin named in said Appendix A, so far as the same refers to this defendant, to the other points mentioned therein affecting this defendant, as shown in such appendix, between the "rate ordered" and "rate paid"; but defendant denies that said advanced rates were unjust or unreasonable.

Defendant further admits that defendant was ordered by the Interstate Commerce Commission to pay the principal sum and interest named in said Exhibit A, and set forth in the order attached to said petition, to plaintiff as assignee of certain alleged shippers named as consignors, but defendant avers that said alleged or pretended consignors were not damaged by the collection of said rates, and that the plaintiff as assignee was not entitled to an award of damages, or to the order of reparation made by said Interstate Commerce Commission.

Defendant further admits, that on February 10, 1904, the Cattle Raisers' Association of Texas filed a complaint before the Interstate Commerce Commission against the defendant and other lines of railway which had established said rates, alleging that such rates were unreasonable, and that, after hearing, said Interstate Commerce Commission, on August 16, 1905, in said Cause No. 732, pending before it, filed the report referred to in plaintiff's petition, in which it was stated that said advanced rates were unjust and unreasonable, but defendant avers that there was no reasonable evidence before said Interstate Commerce Commission upon which to base such statement, and that such statement and report of the Interstate Commerce Commission were arbitrary, without foundation in the evidence, and contrary to law; that at said times said Interstate Commerce Commission had no power to make or establish maximum rates for transportation, and that any such statement is without authority and effect; that the alleged report of said Interstate Commerce Commission was not made upon any investigations had upon any complaint filed before it by any person claiming to have been damaged by reason of anything done or omitted to be done by the defendant in contravention of the provisions of the Interstate Commerce Law, or by any person claiming to have been damaged by reason thereof.

Defendant admits that said advanced rates remained in

effect until November 17, 1908.

[fol. 620] Defendant is without knowledge or information sufficient to form a belief as to the allegation why no formal order was made by the Interstate Commerce Commission pursuant to said alleged report and opinion, and it therefore denies the averments in Paragraph IV. of the petition in respect thereto.

Defendant admits that on August 29, 1906, said Cattle Raisers' Association filed a petition with the Interstate Commerce Commission charging that the rates on cattle from the points nereinbefore mentioned, and that the said advanced rates, were unjust and unreasonable, and praying that the Interstate Commerce Commission should have

further hearing and prescribe just and reasonable rates for the members of said Cattle Raisers' Association of Texas, and others similarly situated; but defendant avers that there was no prayer or demand for specific damages accruing to any shipper or to the plaintiff by reason of the payment of the rates complained of, and that, therefore, the Interstate Commerce Commission was without jurisdiction

to make its alleged findings or order

Defendant admits the hearing by the Interstate Commerce Commission, as stated, on April 14, 1908, and its report and opinion that said rates as advanced, and the advances of said rates, were unjust and unreasonable, as found in its previous opinion, and that the Interstate Commerce Commission used the language as quoted in plaintiff's petition, and that in said report said Interstate Com. merce Commission reserved for further consideration the question of reparation when claims should thereafter be presented: but defendant avers that no specific claims of damage were presented or filed with the Interstate Commerce Commission by any shipper or other party claiming to be damaged, and that the aforesaid report and decision made by said Interstate Commerce Commission upon complaint of the Cattle Raisers' Association, and its order fixing a maximum rate effective November 17, 1908, is wholly irrelevant and immaterial and without force or effect in this controversy; and that the order of the Interstate Commerce Commission awarding damages and reparation was made without jurisdiction and authority, and is therefore void

### V

Defendant avers that no proof was offered to the Interstate Commerce Commission that the parties named in said Appendix A were the consignors or owners of cattle [fol. 621] shipped, or that said parties paid the rate of freight named in said Appendix A, or any rate of freight, and alleges that the order of reparation as against this defendant was made arbitrarily, capriciously, and without evidence to support the same, and it therefore denies that said parties were owners or shippers, or that they were damaged in the amounts named in said appendix, or in any amount, and it denies that the rates charged by the defend-

ant were unjust or unreasonable by the amount shown in said appendix, or by any amount.

### VI

Defendant denies that the facts as found by the Interstate Commerce Commission in its report and opinion were or are true or correct; and denies that plaintiff, as Secretary of the Cattle Raisers' Association of Texas, or his predecessor, in due time or in accordance with law, filed, or caused to be filed, with said Interstate Commerce Commission, for or on account of the shippers, or on their own account as assignees, their petitions or claims for reparation for the amounts claimed to be unlawful charges; and denies that the claims or the rights of the owners of cattle as shippers, or as consignors, were duly or legally assigned to the plaintiff herein, or that he has been or is the legal or equitable owner or holder of any assignment, or entitled to have or recover damages resulting to shippers by reason of anything in said petition alleged; and denies that the plaintiff was entitled to have said order of said Interstate Commerce Commission made in his behalf; but on the contrary, defendant avers that said order was beyond the power of said Interstate Commerce Commission to make, and is therefore void.

Defendant admits that the said order of said Interstate Commerce Commission attached to plaintiff's petition herein, was served upon it, and admits that though requested to pay the claim of the petitioner, it has refused, and still refuses, to pay the same or any part thereof; but defendant denies that it is liable to the plaintiff in the amount claimed, or in any amount.

Wherefore, having fully answered the first count of plaintiff's petition, defendant asks to be discharged with its costs.

For answer to the second count of plaintiff's petition, defendant states:

I

Defendant denies that on or about March 3, 1903, or at any other time, it combined or conspired with other carriers to impose upon shippers unreasonable rates of freight on [fol. 622] shipments of live stock, and denies that the rates referred to in the petition were unreasonable.

Defendant further denies that it was a party to any combination or comspiracy, on or about March 3, 1903, or at any other time, to establish or publish freight rates on cattle or other live stock, or on other commodities, by joint tariffs of rates, or otherwise.

Defendant further denies that it, in combination and conspiracy with other carriers, put into effect or maintained the rates referred to in the petition in restraint of interstate commerce, thereby eliminating competition, as alleged in the petition, and denies that the advance in rates on live stock established by it and referred to in the petition were unjust, unreasonable or unlawful, or in unlawful restraint of interstate commerce, or that the same were continued in force by the defendant by combination or conspiracy with other carriers.

Defendant avers that no proof was offered to the Interstate Commerce Commission that the parties named in Appendix A attached to the petition were the consignors or owners of the cattle shipped, or that said parties paid the rate of freight named in said Appendix A, or any rate of freight, and that the order of reparation as against this defendant made by said Interstate Commerce Commission was made arbitrarily, capriciously and without evidence to support the same, and defendant therefore denies that said parties were the owners or shippers of the cattle shipped, or that said parties made said shipments, and denies that said parties were damaged in their business and property to the extent set out in said petition, or to any extent, and denies that the rates of freight charged by the defendant were unlawful; and denies that said consignors or owners assigned their alleged claims for damages to the plaintiff herein; and denies that plaintiff is entitled to all the rights of said parties; and denies that the plaintiff has been damaged in his business or property, or otherwise, in any amount; and denies that the defendant is liable to the plaintiff in any amount.

Defendant denies that the shippers or owners, or other parties mentioned in the petition, were damaged, or that they are entitled to treble damages, and denies that the plaintiff as assignee or otherwise is entitled to recover any

damages as alleged in the petition.

[fol. 623] Wherefore, having fully answered said second count, defendant asks to be discharged with its costs.

(Signed) E. T. Miller, A. E. Haid, Attorneys for De-

fendant.

## DEFT. Ex. 6b

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI

### No. 4393

# E. B. Spiller, Plaintiff,

VS.

St. Louis & San Francisco Railroad Company, Defendant

## Reply

Now comes the plaintiff and for reply to the answer of the defendant herein denies each and every allegation of new matter therein contained.

(Signed) Cowan & Burney, James A. Seddon, Attorneys for the Plaintiff.

Mr. Miller: We next offer in evidence the Special Master's report of the receivers' first bi-monthly report in this case, dated June 29, 1913, with the exhibit thereto attached, the exhibit showing the receipts and disbursements for the period May 28 to 31, 1913, and for the month of June, 1913.

The Master: That is the final report, isn't it?

Mr. Murphy: No. That is the first bi-monthly report.

What is the purpose of this offer, Mr. Miller?

Mr. Miller: It shows, among other things, the debts of the railroad company for material, supplies, labor, wages. etc. due at the time of the appointment of the receivers. I am offering it for that purpose.

Mr. Murphy: We object to the offer for the reason that it is wholly immaterial, doesn't tend to prove or disprove

any issues in this case.

The Master: It will be admitted subject to the objection.

To which ruling of the Master the interveners then and there duly excepted and still except.

[fol. 624] Said paper was offered as Df't Exhibit 7, and same is in words and figures as follows, to-wit:

Deft. Ex. 7 omitted here as same is identical with Intervener's Ex. 17d (First Bimonthly report.)

Mr. Maler: We next offer in evidence the report of the receivers addressed to the Special Master dated February 18, 1914, and filed in the Clerk's office of the court March 12, 1914, for all purposes, and call attention particularly to that portion of the report showing the payment by the receivers of preferred claims against the railroad company aggregating \$2,229,950,047, and ask that it be marked Exhibit 8.

Mr. Leahy: Why offer the whole document to show the aggregate amount?

Mr. Miller: It is a very small document, only about two or three pages, and it includes a number of other things that were also paid. I am calling attention particularly to preferred claims.

Mr. Murphy: We object to this offer for the following reasons: First, because the report referred to addressed to the Master as aforesaid is wholly immaterial and irrelevant, doesn't prove or tend to prove any issue in this case. Second, because the recitals therein relative to the payment of preferred claims are so indefinite as not to indicate the character of the claims paid.

The Master: It will be taken subject to the objection.

To which ruling of the Master the intervenors then and there duly expected and still except.

Said paper above described offered as Defendant's Exhibit 8 is in words and figures as follows, to-wit:

## DEFT. Ex. 8

IN THE DISTRICT COURT OF THE UNITED STATES WITHIN AND FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI

No. 4174. In Equity

NORTH AMERICAN COMPANY, Complainant,

"S.

St. Louis and San Francisco Railroad Company, Defendant

Report of Special Master on Receivers' First Report, Covering Their Operations under Order Number 51, as to Their Receipts and Disbursements on Account of Receivers' Certificates

The Receivers in the above entitled cause, under the authority and requirements of Order No. 51 entered herein [fol. 625] dated November 13, 1913, having filed in the office of the Master herein their first report of their operations under Order No. 51 as to their receipts and disbursements on account of Receivers' Certificates, I respectfully report as follows:

I have examined their report, which is hereto annexed and made a part hereof, together with the accounts and business of the Receivers appertaining to the Receivers' Certificates and the payment of preferential claims authorized to be paid from the proceeds thereof, as the same are recorded in the books and vouchers of the Receivers, and I find that the report hereto annexed is correct.

Respectfully submitted.

(Signed) Thomas T. Fauntleroy, Special Master. St. Louis, Missouri, March 12, 1914. In the District Court of the United States within and for the Eastern Division of the Eastern District of Missouri

# No. 4174. In Equity

NORTH AMERICAN COMPANY, Complainant,

VS.

St. Louis & San Francisco Railroad Company, Defendant

Thos. T. Fauntleroy, Esq., Special Master, St. Louis.

Sir: The undersigned Receivers of the property of the St. Louis and San Francisco Railroad Company, in obedience to the terms of the order entered in this cause on the 13th day of November, 1913, do report:

That they did, during the month of January, 1914.

Sign \$3,000,000, face amount, of the Receivers' Certificates authorized by the order entered on the 27th day of October, 1913;

Submit to the Clerk of the Court and procure the countersignature, by him or by one of his deputies, on \$2,500,000, face amount, of such certificates;

[fol. 626] Sell for cash \$1,568,000 of said certificates, to-wit:

On January 2, 1914, \$1,000,000 thereof @ 99	
flat, producing	\$990,000 00
On January 14, 1914, \$500,000 thereof, @ 99	
and accrued interest producing	496,000.00
On January 21, 1914 \$68,000 thereof, @ 99	
and accrued interest, producing	67,535.33
Total proceeds of certificates sold	\$1,553,535.33
Use \$857,000 face amount of said cortificator	

848,430.00

in paying preferred claims;

That the aggregate face value of certificates

at rate of 99 flat,-say, as the equivalent in

cash of .....

so sold or used was \$2,425,000;

That the value so obtained by the Receivers for the said certificates, (including \$1,215.33 of accrued interest collected), was the sum of  That out of the fund so created they have liquidated and hold receipts of claimants, (whose claims had been first approved by you according to the terms of the order entered on November 13th, 1913, for payment as preferred claims), to the amount of \$2,229,950.47; out of which claims, however, the Receivers withheld the amount of certain counter-claims, amounting in the aggregate to \$114,476.06, so that the net charge to the fund so created was the sum	\$2,401,965.33
of	2,115,474 41
That the unexpended balance of the fund so created, at close of business on January 31st, 1914, was the sum of  That the said balance was held in separate a	\$286,490.92
following authorized depositories of the Recei	ivers, to-wit:
In the  National Bank of Commerce in St. Louis Third National Bank of St. Louis Mechanics-American National Bank of St. Louis St. Louis Union Trust Company	\$66,813.63 71,092.34 68,297.85 80,287.10
•	\$286,490.92
That the said banks have allowed interest of ances during January, 1914, to the credit of accounts in which the proceeds of Receivers were segregated, the following sums, to-wit:	on daily bal-
Mechanics-American National Bank, the sum of National Bank of Commerce in St. Louis, the sum of Third National Bank in St. Louis, the sum of St. Louis Union Trust Company, the sum of	\$285.97 278.35 302.57 322.58
-	\$1,189.47

[fol. 627] That the Receivers have taken into their current funds, i. e., transferred out of the segregated accounts, the amount of accrued interest collected on certificates sold, say \$1,215.33, and the amount of interest allowed by the banks as above, say \$1,189.47;

That at close of business on January 31st, 1914, the Receivers held as yet unapplied \$500,000, face amount, of certificates not countersigned by the Clerk of the Court or any of his deputies, and \$75,000 of certificates counter-

signed by the Clerk and ready for use.

Respectfully, James W. Lusk, W. C. Nixon, W. B. Biddle, Receivers, by (Signed) F. H. Hamilton, Their Treasurer.

St. Louis, Feby. 18, 1914.

Mr. Miller: The Special Master allowed the claim to the Corporation Commission of Oklahoma for Oklahoma overcharges in the sum of \$76,627.35, and like claims that had been paid by the surety on the railroad bond in that case in the sum of \$12,124.51, making the total amount of overcharges allowed by the Special Master in the Love intervention \$88,751.86. That is shown in the Love case and also in the report of the Special Master in the Love case. I ask if you will agree that those amounts were allowed by the Special Master in the Love case?

Mr. Murphy: Subject to the objection that they are ir-

relevant and immaterial.

Mr. Miller stated (p. 63) that there were filed with the Special Master under the interlocutory decree, the following claims for overcharges against the railroad company, all of which were pending before the Interstate Commerce Commission on application for reparation: Adams Stave Company, \$6,130.65; Cudahy Packing Company, \$198.84; Choctaw Lumber Company, \$6,826.29; Gulf Refining Company, \$418.06; Pittsburg Plate Glass Company, \$3,078.63; Swift & Company, \$1,909.59, and \$120.30; Texas, Oklahoma and Eastern Railroad Company, \$2,694.04, making a total of \$20,976.40. These claims were all allowed by the Special Master in such sums, if any, as the Interstate Commerce Commission should order reparation thereon, and in the

event reparation was denied, the claims were to be dismissed; they were all allowed as general unsecured claims; since that time certain of these claims have been further allowed, reparation having been ordered, as in the case of [fol. 628] the claim of the Pittsburg Plate Glass Company, reparation order for \$3,076.21 with interest at six per cent from March 26, 1913; in the Swift & Company claim, for \$573.62, six per cent interest from July 1, 1912; \$115.48 on the other claim of Swift & Company; the Texas, Oklahoma and Eastern Railroad Company claim being allowed for \$2,284.84.

Mr. Miller: Now Mr. Murphy I have the report of the Special Master on those various claims, and I don't want to encumber the record with it if you will admit that, subject to your objection, the statement which I have made is a correct statement.

In explanation of said statement, counsel for the defendant and the St. Louis-San Francisco Railway Company, stated that the claims aforesaid, at the time of the appointment of the receivers, were pending on applications made to the Interstate Commerce Commission, for orders of reparation; that was true of the Texas, Oklahoma, and Eastern Railroad Company's claims, which were, as counsel recalled it, made against the Frisco for the Frisco's proportion of overcharges that had been assessed on through movement originating on the T., O., & E. It was either that or it was the [the] Frisco's T., O., & E. claim under the tap line cases, as the initial carriers' claim against the Frisco. It was one or the other. (P. 64.)

By "tap line cases," counsel meant those cases where short lines—lumber lines usually—claimed a certain division out of the through movement. He was not certain whether they fell in that class, or not; they were not of very much importance either way. Counsel for the defendant and the St. Louis-San Francisco Railway Company stated that in those claims filed before the Special Master, no defense was made by the defendants and by the receivers, that the Interstate Commerce Act required the claims to proceed in an action at law. In one or two, the parties appeared here under the oral agreement that an order should be made, that if the Master allowed the claims, they should be for the amount fixed by the Interstate Com-

merce Commission. No claim was made that they were prior in equity to claims of bondholders; they were allowed as claims of general creditors, and filed as general claims. None were paid as preferred claims. Counsel's understanding was that none of the claimants received the full amount of his claims in cash. Some of the claimants accepted the checks of the Special Master, under the order of distribution, which was at the rate of seven seventy per thousand, face value.

[fol. 629] The Master: What is the bearing on this case,

that it exhausted the trust fund?

Mr. Miller: The principal reason that I am offering this testimony is to show that other parties similarly situated as the intervenors came in under the interlocutory decree and filed their claims and had them protected, just as the intervenors were insisting the other day that they were doing everything they could, and therefore were not guilty of laches in respect to the claim. I am rebutting that testimoney, and the further conclusion also that comes from it that to allow these claims now would discriminate against these parties who did file their claims pursuant to the order.

The Master: Well, it would discriminate in their favor.

Mr. Miller: In favor of the present parties?

The Master: No, of the other parties. If these claims had been allowed, it would have been less pro rata than the amount of money received by the other claimants.

Mr. Miller: Yes, but the other claimant accepting seven dollars on the thousand is a great disadvantage to these people who did not file their claims and are seeking to re-

cover dollar for dollar.

The Master: Well, the other people wouldn't have been prejudiced by these claimants not coming in, because the others would have gotten more than they would have received if these claimants had come in and had been entitled to their pro rata.

Mr. Miller: If they had been allowed to come in as general creditors that would have been true, but it is not neces-

sary to recover preferential claims.

The Master: Well, how would that hurt the other people! Mr. Miller: We are taking the position that these other people came in under the order requiring them all to come in and were diligent. They get only a certain amount. The

present claimants that stay out of the case now come in and ignore the order to file their claims and seek to get more than the other people did who complied with the order of court. It bears on that and on the question of laches, lack of diligence.

[fol. 630] Mr. Murphy: Now, Mr. Miller, I presume that your question to me is whether or not we concede the fact

under the conditions you stated is correct?

Mr. Miller: That is what I submit the statement for.

Mr. Murphy: As to admitting the fact, subject to objection, we assume that that is true, but we cannot accept the conclusion that you drew from your facts which you recited, we cannot agree to that.

Mr. Miller: I don't want you to. I don't ask you to.

Mr. Murphy: With that understanding, our concession may go in the record.

The Master: You are simply admitting the correctness of the facts?

Mr. Murphy: Yes. Now, we object to the offer of those facts and to the facts for the reason that they are wholly incompetent, irrelevant and immaterial. people did or failed to do could have no bearing upon our case. It appears from the statement that these claimants filed claims as general creditors and asked for no priority. Of course, their failure in that respect couldn't affect our case. Any understanding that the defendant or the receivers through their counsel might have had with these claimants couldn't have any bearing upon our case. fact that the railroad company and the receivers raised no defenses in that case or in those cases that were available could not justify any claim that they would not have raised them as defenses to our claim. The Act to Regulate Commerce recites what the claimants from whom overcharges have been illegally exacted must do. We followed that remedy prescribed. We followed it in the face of a continuous and bitter contest made after the order of reparation was issued from December, 1914, to June 6, 1920, a contest made by the attorneys for the receivers of the defendant railroad company, and a contest made by the attorneys for the St. Louis-Francisco Railway Company after November, I think it is, 1916. We think the offer is wholly immaterial, irrelevant and incompetent, does not prove or tend to prove any issue in the case.

The Master: That offer will be admitted subject to the objection.

To which ruling of the Master the Interveners then and there duly excepted.

[fol. 631] At this point, counsel for defendant and the St. Louis-San Francisco Railway Company, stated in regard to a statement showing the proceeds of bonds issued by the old company, the railroad company, from 1908 to 1913, which he offered in evidence as follows:

The statement shows the proceeds of bonds that were issued under our general lien and our refunding mortgages. It is merely for the purpose of showing how much money the railroad company turned into its treasury as the proceeds of the sale of its bonds between those dates. (P. 69) Before the issue of these securities during certain periods, permits had to be secured from the Public Service Commission of Missouri, and from the Interstate Commerce Commission. but not from the Public Service Commission, subsequent Whatever authority was nesessary from the Interstate Commerce Commission, was secured. The statement was filed merely for the purpose of showing how the proceeds from the sale of bonds was used, that they went into the treasury; they were used for those purposes, but the proceeds were used for other purposes, also in operating the railroad; large quantities were used for operating the railroad.

To which statement, counsel for intervenors objected on the ground that it is wholly immaterial and irrelevant, and does not prove or tend to prove any issue in the case, and on the ground that it is incompetent, without showing the purposes for which the proceeds from the sale of bonds were used.

Which objections was by the Master overruled; to which ruling of the Master, counsel for intervenors duly excepted, and continue to except. (P. 70)

Said statement offered as Defendant's Exhibit 9, is in words and figures as follows, to-wit:

# Det's Ex. 9

The Kansas City, Fort Scott & Memphis Railway Company

Refunding Mortgage 4% Bonds Sold During Period Nov. 17, 1908, to May 27, 1913, Incl.

11, 1900, to May 21, 1910, Incl.	
Date	Price
June 21, 1909	\$162,525.00
**	
**	
**	
44	
July 1, 1909	165,000.00
June 23, 1910	93,750.00
[fol. 632] June 24, 1910	475,500.00
June 27, 1910	232,500.00
Mar. 20, 1911	27,900.00
	747,100.00
Apr. 11, 1911	533,200.00
May 4, 1911	465,000.00
May 8, 1911	310,000.00
Nov. 21, 1911	209,475.00
Total	3,421,950.00

# St. Louis and San Francisco R. R. Co.

Secured Gold Notes Issued Between Nov. 17, 1908, and May 27, 1913

	-1, 1010	
Date	Title	Maturity date Proceeds
3/1/1910	St. L. & S. F. R. R. Three	
	Year 5% Secured Gold	
0/4/4044	Notes of 1913	3/1/1913 7,480,000 00
0/1/1911	St. L. & S. F. R. R. Two	6-2
	Year 5% Secured	
	Golds Notes	6/1/1913 2,205,000.00
9/3/1912	St. L. & S. F. R. R.	0, 1, 1313 2,203,000.00
	Two Year 6% Se-	
	cured Gold Notes	9/1/1014 1 141 000 00
	dold Hotes.	
		1,034,000.00

2,444,000.00

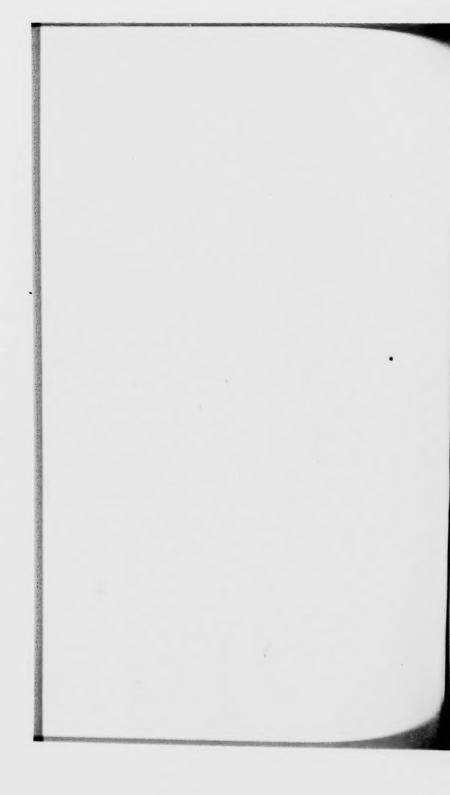
Office of Valuation Accountant, St. Louis, Mo., Nov. 25, 1921

St. Louis and San Francisco Railroad Company

# General Lien 15-20 Year Gold Bonds Sold Between Nov. 17, 1908, and May 27, 1913

Date se	17, 1908, and A	lay 27, 1913	
			Preceeds
Dec. 31,	1908		\$9,600,000.00
Jan.	1909		2,400,000.00
	44		3,200,000.00
Feb.			
May			800,000.00
June	44		8,000,000.00
August	46		4,075,000.00
[fol. 633]	October 1909	******	6,262,500.00
January	1910		417,500.00
February	44		43,220.00
April			417,500.00
October	***		2,505,000.00
November	• • • • • • • • • • • • • • • • • • •		352,370.00
January	1011		1,317,630.00
"	44		1,660,000.00
April	**		1,263,750.00
December	44		5,897,500.00
March	*************		2,170,050.00
	1912		2,535,000.00
April	4.1		780,000.00
May 2,			780,000.00
ο,			390,000.00
" 15,	** ******************		390,000.00
			, , , , , , ,

<sup>55,257,220 00</sup> 



Office of Valuation Accountant, St. Louis, Mo., Nov. 25, 1921

# St. Louis & San Francisco Railroad Company

Refunding Mortgage 4% Bonds Sold During Period Nov. 17, 1908, to May 27, 1913, Incl.

							,			 		٠,	4			٠,		_	•	3	.,	1	7,		ш	HC.	1.
Date																											Proceeds
1909																											
July						٠				 																	\$853,370.00
1910																											
June						*		* 1	. ,					. ,							*						60,840.00
																											390,000.00
1911																											
June	• •	٠			0	0	۰			۰	۰	0					٠	۰		٠							499,957.50
1912																											
June									*						*												257,180.00
	71			,																							
	1	0	U	II	0					0	0	 											4	۰			\$2,061,347.50

Mr. Miller: I next offer in evidence any analysis of the items shown in the record of the receiver from May 28, 1913, to June 10, 1913, covering their first report—

[fol. 634] Mr. Murphy: With the understanding that in addition to the objection of relevancy and immateriality, we can introduce any other objection that we may desire to make after you have furnished us with a copy of it, it will be all right.

The Master: Admitted subject to objection.

To which ruling of the Master, the interveners then and there duly excepted and still except. (P. 72.)

Said paper offered as defendant's Exhibit 10, is in words and figures, as follows, to-wit:

(Here follows Exhibit 10, marked side folio page 635)

[fol. 636] Mr. Miller: I believe that is all that we have to offer. (P. 72.)

#### Interveners' Rebuttal Evidence

Interveners offered the following evidence in rebuttal:

Interveners at this point offered in evidence the statement showing the net income of the railroad Company from June, 1906, to the date of appointment of the receivers.

Mr. Miller: We make the same objections to that as are contained in our answers.

The Master: The statement will be admitted subject to objection. To which ruling of the Master the defendant then and there duly excepted and still excepts. (P. 72.)

Said statement offered as interveners' Exhibit 21, is identical with interveners' Exhibit 18a, and is, therefore, omitted here.

At this point interveners offered in evidence the order confirming the sale, with the Exhibit thereto attached.

Mr. Miller: That is objected to for the same reasons. The Master: Taken subject to objections.

To which ruling of the Master the defendant then and there duly excepted and still except. (p. 73.)

Said document offered as interveners' Exhibit 22, is in words and figures, as follows, to-wit:

#### Ex. 22

At a Term of the District Court of the United States for the Eastern Division of the Eastern District of Missouri, in the Eighth Judicial Circuit, in the City of St. Louis, on the 29th Day of August, 1916

Present: Hon. Walter II. Sanborn, United States Circuit Judge.

[fol. 637] No. 4174. In Equity

NORTH AMERICAN COMPANY, Complainant,

against

St. Louis and San Francisco Railroad Company, Defendant

## No. 4174. In Equity

NORTH AMERICAN COMPANY, Complainant,

against

St. Louis and San Francisco Railroad Company, Defendant

No. 4290. In Equity

RAIL JOINT COMPANY, Complainant,

against

St. Louis and San Francisco Railroad Company, Defendant

No. 4304. In Equity

Bankers Trust Company and Neill A. McMillan, as Trustees, Complainants,

against

St. Louis and San Francisco Railroad Company, Defendant

No. 4334. In Equity

Guaranty Trust Company of New York, as Trustee, Complainant,

against

St. Louis and San Francisco Railroad Company, Bankers Trust Company, and Neill A. McMillan, Defendants

Consolidated Cause Final

Order Confirming Sale—No. 181-C

This cause came on further to be heard on the petition of Basil B. Elmer and William P. Philips dated July 19, 1916, and on the Special Master's Report of Sale filed herein July 19, 1916, and on all other proceedings in the above-entitled cause, and was argued by counsel, and thereupon, upon consideration thereof, the Court being fully advised in the premises, finds, adjudges, and decrees as follows:

I. The Special Master appointed to be the Special Master referred to in the Final Decree made and entered herein

March 31, 1916, has fully complied with all the directions in said Final Decree contained as to the sale of the property of the defendant Railroad Company.

- II. The sale of said property held July 19, 1916, was held in all respects as provided by said Final Decree, and at said sale the Special Master sold at public auction to Basil B. Elmer and William P. Philips, as joint tenants and not as tenants in common, all property of every character and description of the defendant Railroad Company, including all property of every kind and description acquired or held by the Receivers in the above entitled cause, in parcels and for prices as follows, the bid of said Basil B. Elmer [fol. 638] and William P. Philips for the respective parcels being, in each case, the highest bid for said parcel:
- (1) The property embraced in the Trust Agreement of June 1, 1911, securing the Two Year Five Per Cent Secured Gold Notes of the defendant Railroad Company, separately and as an entirety, but subject to said Trust Agreement, for the sum of \$10;
- (2) The property embraced in the Trust Agreement of September 3, 1912, securing the Two Year Six Per Cent Secured Gold Notes of the defendant Railroad Company, separately and as an entirety, but subject to said Trust Agreement, for the sum of \$10;
- (3) The securities pledged to secure the promissory note of the defendant Railroad Company held by the complainant North American Company, separately and as an entirety, for the sum of \$600,000;
- (4) All the remaining property of the defendant Railroad Company, as an entirety, for the sum of \$45,700,200.
- III. Said Basil B. Elmer and William P. Philips have duly assigned to St. Louis-San Francisco Railway Company, a corporation duly organized and existing under the laws of Missouri, all their right, title and interest in and to the property described in the form of deed hereto annexed and marked Exhibit A, sold to them as aforesaid, including their right to receive a deed or deeds or other instruments of transfer and conveyance thereof as provided in said Final Decree.

IV. There has been made under or pursuant to, or in connection with, the Plan and Agreement dated November 1, 1915, for the Reorganization of St. Louis and San Francisco Railroad Company, a copy of which has been filed herein with the Special Master's Report of Sale, to all creditors of the defendant Railroad Company who have presented their claims in accordance with the orders of this Court in this cause, or in any constituent cause, and who have claims subordinate in lien and inferior in equity to the Refunding Mortgage of the defendant Railroad Company described in said Final Decree, or to the General Lien Mortgage of the defendant Railroad Company described in said Final Decree, a fair and timely offer of cash or a fair and timely offer of participation in St. Louis-San [fol. 639] Francisco Railway Company, a corporation organized for the purpose of becoming the owner, through a sale under said Final Decree of a part of the property specified in Articles Twenty-sixth and Twenty-seventh of said Final Decree.

It is therefore ordered, adjudged and decreed as follows:

First. The Special Master's Report of Sale filed herein July 19, 1916, is in all things confirmed and the sale therein reported, namely: the sale to Basil B. Elmer and William P. Philips of all property of every character and description of the defendant Railroad Company, including all property of every kind and description acquired or held by the Receivers in the above entitled cause, in parcels and for prices as follows:

- (1) The property embraced in the Trust Agreement of June 1, 1911, securing the Two Year Five Per Cent. Secured Gold Notes of the defendant Railroad Company, separately and as an entirety, but subject to said Trust Agreement, for the sum of \$10;
- (2) The property embraced in the Trust Agreement of September 3, 1912, securing the Two Year Six Per Cent. Secured Gold Notes of the defendant Railroad Company, separately and as an entirety, but subject to said Trust Agreement, for the sum of \$10;
- (3) The securities pledged to secure the promissory note of the defendant Railroad Company held by the com-

plainant North American Company, separately and as an entirety, for the sume of \$600,000;

(4) All the remaining property of the defendant Railroad Company, as an entirety, for the sum of \$45,700,200, is made final and absolute, subject, however, to all the terms and conditions of said Final Decree and to all the reservations to the purchasers and to their assigns and to this Court in said Final Decree contained.

Second. The Special Master is directed, upon the payment and settlement of the purchase price, or making provision therefor, as hereinafter in this order provided, or as may be permitted by any other order or any other decree made in this cause, to execute and deliver to St. Louis San-Francisco Railway Company a deed of the property described in the form of deed hereto annexed and marked Exhibit A, substantially in said form, which is approved by this Court, and to execute and deliver to Basil B. Elmer [fol. 640] and William P. Philips, as joint tenants and not as tenants in common, a deed of the property described in the form of deed hereto annexed and marked Exhibit B, substantially in said form, which is approved by this Court; and the defendant Railroad Company, the Receivers herein, Guaranty Trust Company of New York, as Trustee under the Refunding Mortgage of the defendant Railroad Company, and Bankers Trust Company and Neill A. McMillan, as Trustees under the General Lien Mortgage of the defendant Railroad Company, are directed to join with the Special Master in the execution and delivery of a deed to St. Louis-San Francisco Railway Company substantially in the form of said deed Exhibit A, or, if said St. Louis-San Francisco Railway Company shall so request, to execute and deliver to said St. Louis-San Francisco Railway Company separate deeds or releases of all their right, title and interest of, in and to the property so conveyed, assigned and transferred to said St. Louis-San Francisco Railway Company by the Special Master; and the defendant Railroad Company, the Receivers herein and Bankers Trust Company and Neill A. McMillan, as Trustees under the General Lien Mortgage of the defendant Railroad Company, are directed to join with the Special Master in the execution and delivery of a deed to Basil B. Elmer and

William P. Philips, as joint tenants and not as tenants in common substantially in the form of said deed Exhibit B, or, if said Basil B. Elmer and William P. Philips shall so request, to execute and deliver to said Basil B. Elmer and William P. Philips, as joint tenants and not as tenants in common, separate deeds or releases of all their right, title and interest of, in and to said property so conveyed, assigned and transferred to said Basil B. Elmer and William P. Philips by the Special Master. The trustees in whose names is held any of the real estate described in said form of deed Exhibit B are authorized and directed to execute and deliver to said Basil B. Elmer and William P. Philips, declarations that they hold said real estate as trustees for said Basil B. Elmer and William P. Philips, as joint tenants and not as tenants in common.

Third. Upon the production of said respective deeds, the grantee or grantees therein named shall be let into the possession of the property thereby conveyed or transferred, and shall after such delivery of possession, hold, possess and enjoy the property so conveyed and transferred, and every part and parcel thereof, free from any trust or lien [fol. 641] imposed thereon by the Refunding Mortgage of the defendant Railroad Company, and free from any trust or lien imposed thereon by the General Lien Mortgage of the defendant Railroad Company, and free from all claims, rights, interest or equity of redemption, in or to the same by or of the defendant Railroad Company, its successors and assigns, and by or of the creditors and stockholders of the defendant Railroad Company, and by or of all persons claiming by, under or through the defendant Railroad Company, its creditors or its stockholders, subject, however, to all the terms and conditions of said Final Decree and to all the reservations to the purchasers and to their assigns and to this Court in said Final Decree contained.

Fourth. There shall be credited upon the purchase price of the securities pledged to secure the promissory note of the defendant Railroad Company held by the complainant North American Company, the sum of \$100,000, deposited with the Special Master by said Basil B. Elmer and William P. Philips, by certified check, as a pledge that they would make good their bid for said securities; and there shall be credited upon the purchase price of the property

mentioned in subdivision (4) of Article First hereof, the sum of \$150,000 deposited with the Special Master by said Basil B. Elmer and William P. Philips, by certified check. as a pledge that they would make good their bid for said property, and also the distributive share, out of the proceeds of sale, of the Refunding Mortgage Bonds and General Lien Mortgage Bonds and appurtenant coupons held subject to the order of the Special Master pursuant to the certificates of Central Trust Company of New York and Bankers Trust Company, both dated July 14, 1916, deposited by said Basil B. Elmer and William P. Philips with the Special Master, as stated in his Report of Sale. In advance of the delivery of said deeds, and within sixty days from the date of the entry of this order, or within such additional period as this Court may hereafter by its order or decree permit, said Basil B. Elmer and William P. Philips or said St. Louis-San Francisco Railway Company shall pay or cause to be paid in eash on account of the purchase price of the property sold to said Basil B. Elmer and William P. Philips, the following sums:

(1) the purchase price of the property embraced in the Trust Agreement of June 1, 1911, securing the Two Year Five Per Cent. Secured Gold Notes of the defendant Railroad Company, to-wit; the sum of \$10;

[fol. 642] (2) the purchase price of the property embraced in the Trust Agreement of September 3, 1912, securing the Two Year Six Per Cent. Secured Gold Notes of the defendant Railroad Company, to-wit: the sum of \$10; and

(3) the unpaid balance of the purchase price of the securities pledged to secure the promissory note of the defendant, Railroad Company held by the complainant North American Company, to-wit: the sum of \$500,000.

and shall provide for the payment of the remainder of the purchase price of the property mentioned in subdivision (4) of Article First hereof by turning over to the Special Master, to be cancelled or credited as provided in said Final Decree, bonds and coupons to be paid out of the proceeds of sale on distribution thereof, as set forth in said Final Decree, to at least the following amounts in addition to the bonds specified in the certificates of Central Trust Com-

pany of New York and Lunkers Trust Company, both dated July 14, 1916, heretofore deposited with the Special Master:

Refunding Mortgage Bonds, \$35,000,000, principal amount; General Lien Mortgage Bonds, \$35,000,000, principal amount

Said bonds and coupons shall be in bearer form or accompanied by proper transfers to the Special Master. In lieu of turning over to the Special Master said bonds, the Special Master may accept the certificate of any national bank or trust company in the City of New York or the City of St. Louis acceptable to the Special Master, that it holds subject to his order bonds of the amount and character therein specified, and, and if in bearer form, accompanied by the coupons therein stated. No further payment in cash shall be required on account of the purchase price of any of said property unless this Court shall so require, but this Court reserves jurisdiction from time to time to require such further payment or payments in eash on account of said purchase price as this Court may direct, and this Court reserves a paramount lien and charge upon the property to be conveyed as in this order provided, for the payment into this Court in cash of the unpaid part of the purchase price.

Fifth. Upon the execution and delivery by the Special Master to St. Louis-San Francisco Railway Company of a deed substantially in the form of said deed Exhibit A, and the execution and delivery by St. Louis-San Francisco Railway Company to the Special Master of a counterpart thereof, all obligations and liabilities of Basil B. Elmer and [fol. 643] William P. Phillips on account of the purchase of any of the property of the defendant Railroad Company or by reason of their bid at said sale under said Final Decree or the acceptance of said bid, shall forwith cease and determine and said Basil B. Elmer and William P. Phillips shall individually be discharged from all such obligations and liabilities.

Sixth. The bonds and coupons held subject to the order of the Special Master pursuant to the certificates of Central Trust Company of New York and Bankers Trust Com-

pany, both dated July 14, 1916, deposited by said Basil B. Elmer and William P. Philips with the Special Master as stated in his said Report of Sale, and the bonds and coupons represented by any certificates which may be accepted by the Special Master pursuant to the provisions of Article Fourth of this order, shall remain with the banks or trust companies by whom such bonds and coupons are held, to abide the further order of this Court; and when the amounts payable out of the proceeds of sale upon the Refunding Bonds and appurtenant coupons, and upon the General Lien Bonds and appurtenant coupons, shall have been determined as in said Final Decree provided, the Special Master shall give notice of the time and place where said bonds and coupons may be presented for payment as in said Final Decree provided, and all such bonds and coupons presented for payment shall be stamped with a notation of the credit or payment thereon of the amount so payable and such bonds and coupons shall thereafter be delivered to St. Louis-San Francisco Railway Company and the other parties presenting the same.

Seventh. All questions relating to amounts of compensation, charges, allowances, costs, disbursements and expenses, recorred to in said Final Decree, are hereby respectively reserved by this Court for further hearing and determination, and all payments to be made therefor, unless agreed upon by the parties in interest, shall hereafter be determined, fixed, allowed and settled by this Court, and all questions not hereby disposed of are reserved for future adjudication. Any party to this cause and any party to any of the separate causes consolidated into this cause and any party who has intervened in this cause or in any constituent cause, may at any time apply to this Court for further relief at the foot of this order.

Walter H. Sanborn, United States Circuit Judge.

[fol. 644]

### Ехнівіт А

Indenture, dated September —, 1916, between Thomas T. Fauntleroy, as Special Master, appointed by an order entered in the consolidated cause hereinafter mentioned June 8, 1916, to be the Special Master referred to in the

Final Decree made and entered in said consolidated cause March 31, 1916 (hereinafter called the Special Master).

party of the first part;

St. Louis and San Francisco Railroad Company, a corporation organized and existing under the laws of the State of Missouri (hereinafter called the Railroad Company). party of the first part;

James W. Lusk, William C. Nixon and William B. Biddle, as Receivers of the property of the Railroad company appointed in said consolidated cause (hereinafter called the

Receivers), parties of the third part:

Guaranty Trust Company of New York, a corporation organized and existing under the laws of the State of New York, as trustee under the Refunding Mortgage of the Railroad Company dated June 20, 1901 (hereinafter called the

Refunding Trustee), party of the Fourth part;

Bankers Trust Company, a corporation organized and existing under the laws of the State of New York, and Neill A. McMillan, a resident and citizen of the State of Missouri, as trustees under the General Lien Mortgage of the Railroad Company, dated August 27, 1907 (hereinafter called the General Lien Trustees), parties of the fifth part;

Basil B. Elmer and William P. Phillips (hereinafter

called the Purchasers) parties of the sixth part; and

St. Louis-San Francisco Railway Company, a corporation organized and existing under the laws of the State of Missouri (hereinafter called the Railway Company) party

of the seventh part.

Whereas in a certain consolidated cause pending in the District Court of the United States for the Eastern District of Missouri, Eastern Division, entitled "North American Company, Complainant, against St. Louis and San Francisco Railroad Company, Defendant, In Equity No. 4174, Consolidated Cause, Final," there was made and entered on March 31, 1916, a Final Decree, whereby, as amended, nune pro tune as of March 31, 1916, by an order entered in said consolidated cause May 15, 1916, among [fol. 645] other things, it was ordered, adjudged and decreed that all property of every character and description of the Railroad Company, including all property of every kind and description acquired or held by the Receivers in said consolidated cause, should be sold in the manner and

subject to the provisions in said Final Decree set forth, and that said sale should be made at the roundhouse, near the point where the mortgaged lines of railroad of the Railroad Company cross the line of Chouteau Avenue in the City of St. Louis in the State of Missouri upon the property to be sold, on a day and at an hour to be fixed by the Special Master, or as the Court might order, and that notice of the time and place and terms of sale, describing briefly the property to be sold, and referring to said Final Decree, should be published at least once a week for four successive weeks preceding the date of such sale, in a newspaper printed, regularly issued and having a circulation in the City of St. Louis, and State of Missouri, and in a newspaper published in the Borough of Manhattan, City

of New York, State of New York; and

Whereas by said Final Decree it was also, among other things, ordered, adjudged and decreed that the Railroad Company, or some one in its behalf, should, within thirty days after the entry of said Final Decree pay or cause to be paid to Guaranty Trust Company of New York, as trustee. for the use and benefit of the holders of the outstanding Refunding Bonds of the Railroad Company, and of the coupons appertaining thereto which matured July 1, 1914, the sum of Seventy-four million, eight hundred and twentythree thousand, one hundred and nine and 74/100 dollars (\$74,823,107,74) in gold coin of the United States of America, with interest thereon at the rate of six per cent per annum from the date of the entry of said Final Decree to the date of payment, and that within the same time the Railroad Company, or some one in it behalf, should also pay or cause to be paid to Bankers Trust Company and Neill A. McMillan, as trustees, for the use and benefit of the holders of the outstanding General Lien Bonds of the Railroad Company, and of the coupons appertaining thereto which matured May 1, 1914, and November 1, 1914, respectively, the sum of Seventy-eight million, fifty-seven thousand dollars (\$78,057,000) in gold coin of the United States of America, with interest thereon at the rate of six per cent per annum, from the date of the entry of said Final Decree to the date of payment; and

[fol. 646] Whereas neither the Railroad Company nor anyone in its behalf has paid or caused to be paid either of

said sums or any sums, although more than thirty days have elapsed since the entry of said Final Decree; and

Whereas Thomas T. Fauntleroy was, by an order entered in said consolidated cause June 8, 1916, appointed to be the Special Master referred to in said Final Decree, and by said Final Decree was directed to make and conduct said sale and to execute a deed or deeds or other instrument or instruments of conveyance or assignment and transfer of the property sold to the purchaser or purchasers thereof, or his or their assigns, upon an order confirming such sale, and upon payment or settlement of the purchase price, or making provision therefor, as in said Final Decree provided, or as might be permitted by any order or other decree made in said consolidated cause; and

Whereas July 19, 1916, at twelve o'clock noon, was duly fixed by the Special Master as the day and hour for the said sale and notice of the time and place and terms of sale was duly given in accordance with the provisions of said Final

Decree and in accordance with law; and

Whereas the Special Master on said July 19, 1916, at twelve o'clock, noon, at the round house near the point where the mortgaged lines of railroad of the Railroad Company cross the line of Chouteau Avenue in the City of St. Louis in the State of Missouri upon the property to be sold, pursuant to and in accordance with all the provisions of said Final Decree, sold at public auction to the Purchasers, as joint tenants and not as tenants in common, all property of every character and description of the Railroad Company, including all property of every kind and description acquired or held by the Receivers in said consolidated cause, in parcels and for prices as follows:

- (1) The property embraced in the Collateral Trust Agreement of June 1, 1911, securing the Two Year Five Per Cent Secured Gold Notes of the Railroad Company, separately and as an entirety, for the sum of \$10,
- (2) The property embraced in the Trust Agreement of September 3, 1912, securing the Two Year Six Per Cent Gold Notes of the Railroad Company, separately and as an entirety, for the sum of \$10,
- (3) The securities pledged to secure the promissory note of the Railroad Company held by North American Com-

pany, separately and as an entirety, for the sum of \$600,000, and

[fol. 647] (4) All the remaining property of every character and description of the Railroad Company, as an entirety, for the sum of \$45,700,200,

the Purchasers being the highest bidders for all the various parcels of said property at said sale and having duly qualified as bidders thereat for each parcel in the manner provided in said Final Decree: and

Whereas the Special Master did after said sale and on or about July 19, 1916, make a report of said sale to the District Court of the United States for the Eastern Division of the Eastern District of Missouri and said report was duly filed in the office of the Clerk of said Court on said day; and

Whereas thereafter, by an order duly made and entered—, 1916, by said District Court of the United States for the Eastern Division of the Eastern District of Missouri in said consolidated cause, hereinafter called the Order of Confirmation, said report was confirmed, and the sale to the Purchasers of all said property was made final and absolute, and said Court directed the manner in which the purchase price of each of said several parcels should be paid or provided for; and

Whereas that portion of the purchase price of each of said parcels required to be paid in advance of the delivery of instruments of conveyance and transfer has been so paid or settled or provision for the payment thereof has been made in manner approved by said Court, all as by said

Order of Confirmation provided; and

Whereas the Purchasers have duly assigned, transferred and set over unto the Railway Company, party hereto of the seventh part, all of their right, title and interest in and to the property hereinafter described and sold to them as aforesaid, including their right to receive a deed or deeds or other instrument or instruments of conveyance, assignment and transfer of said property as provided in said Final Decree; and

Whereas by said Order of Confirmation, the form of this indenture was approved by said Court and the Special Master, the Railroad Company, the Receivers, the Refunding

Trustee and the General Lien Trustees were directed to execute and deliver an indenture in the form hereof;

Now, therefore, this indenture witnesseth:

That said Thomas T. Fauntleroy, as Special Master as aforesaid, party of the first part, in order to carry into [fol. 648] effect said sale and in pursuance of said Final Decree and said Order of Confirmation and in consideration of the aforesaid payment of and provision for the purchase price, the receipt of which is hereby acknowledged, and in further consideration of the obligations, undertakings, and agreement of St. Louis-San Francisco Railway Company hereinafter set forth, has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred and set over and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer and set over unto St. Louis-San Francisco Railway Company, the party of the seventh part, all the property of every character and description of St. Louis and San Francisco Railroad Company, including all property of every kind and description acquired and held by James W. Lusk, William C. Nixon and William B. Biddle as Receivers in said consolidated cause, being the property more particularly described as follows:

A. The property embraced in the Refunding Mortgage dated June 20, 1901, from the Railroad Company to Morton Trust Company and William H. Thompson, as trustees, under which Guaranty Trust Company of New York is now sole trustee, being:

"Here follows detained description of the properties, included in the Deed, incorporated in the decree confirming the sale, as Exhibit A."

Excepting, however, from the property hereby conveyed, assigned and transferred the property conveyed, assigned and transferred by the Special Master, the Railroad Company and the Receivers to the Purchasers by indenture of even date herewith.

To have and to hold, possess and enjoy all and singular the above mentioned real and personal property, rights, franchises, privileges and immunities thereto appertaining hereby conveyed, or intended so to be, unto said St. Louis-San Francisco Railway Company, its successors and assigns, to its and their own proper use, benefit and behoof forever, free and discharged from any trust or lien imposed thereon by the Refunding Mortgage of the Railroad Company and free and discharged from any trust or lien imposed thereon by the General Lien Mortgage of the Railroad Company and free and discharged from all claims, rights, interest or equity of redemption of, in or to the same by or of the Railroad Company, its successors and assigns, and by or of the creditors and stockholders of the Railfol. 649] road Company, and by or of all persons claiming by or under or through the Railroad Company, its creditors or its stockholders.

Subject, however, insofar as the lien of any of the following instruments covers any of said property, to the lien of such instruments, viz:

- (1) Mortgage or deed of trust, dated July 1, 1896, executed by St. Louis and San Francisco Railroad Company to The Mercantile Trust Company and Paschal P. Carr as Trustees, to secure Consolidated Mortgage Bonds of said St. Louis and San Francisco Railroad Company;
- (2) Mortgage or deed of trust, dated January 1, 1898, executed by St. Louis and San Francisco Railroad Company to Central Trust Company of New York as Trustee, to secure Southwestern Division First Mortgage Bonds of said St. Louis and San Francisco Railroad Company;
- (3) Mortgage or deed of trust, dated March 28, 1899, executed by St. Louis and San Francisco Railroad Company to Continental Trust Company of the City of New York as Trustee, to secure Central Division First Mortgage Bonds of said St. Louis and San Francisco Railroad Company;
- (4) Mortgage or deed of trust, dated October 1, 1900, executed by St. Louis and San Francisco Railroad Company to Continental Trust Company of the City of New York as Trustee, to secure Northwestern Division First Mortgage Bonds of said St. Louis and San Francisco Railroad Company;

- (5) Trust indenture, dated August 1, 1880, executed by St. Louis and San Francisco Railway Company to The United States Trust Company of New York as Trustee, to secure Trust Mortgage Six Per Cent. Bonds of 1880 of said St. Louis and San Francisco Railway Company;
- (6) Trust indenture, dated December 15, 1887, executed by St. Louis and San Francisco Railway Company, to Union Trust Company of New York as Trustee, to secure Trust Mortgage Five Per Cent. Bonds of 1887 of said St. Louis and San Francisco Railway Company;
- (7) Mortgage or deed of trust, dated July 1, 1881, executed by St. Louis and San Francisco Railway Company to The United States Trust Company of New York as Trustee, to secure General Mortgage Five Per Cent. Bonds [fol. 650] and Six Per Cent. Bonds of said St. Louis and San Francisco Railway Company;
- (8) Mortgage or deed of trust, dated July 29, 1879, executed by St. Louis and San Francisco Railway Company to Charles L. Perkins and Jacob Seligman as Trustees, to secure Missouri and Western Division First Mortgage Bonds of said St. Louis and San Francisco Railway Company;
- (9) Mortgage or deed of trust, dated September 1, 1879, executed by St. Louis, Wichita and Western Railway Company to Charles L. Perkins and Jacob Seligman, as Trustees, to secure First Mortgage Bonds of said St. Louis, Wichita and Western Railway Company;
- (10) Mortgage or deed of trust, dated October 1, 1903, executed by Ozark and Cherokee Central Railway Company to Continental Trust Company of the City of New York as Trustee, to secure First Mortgage Bonds of said Ozark and Cherokee Central Railway Company;
- (11) Mortgage or deed of trust, dated June 1, 1902, executed by Muskogee City Bridge Company to St. Louis Union Trust Company as Trustee, to secure First Mortgage Bonds of said Muskogee City Bridge Company;
- (12) Mortgage or deed of trust, dated January 10, 1902, executed by St. Louis, Memphis and Southeastern Railroad

Company to Old Colony Trust Company and John F. Shepley, as Trustees, to secure First Mortgage Bonds of said St. Louis, Memphis and Southeastern Railroad Company:

- (13) Mortgage or deed of trust, dated October 1, 1894, executed by Pemiscot Railroad Company to Union Trust Company of St. Louis as trustee, to secure First Mortgage Bonds of said Pemiscot Railroad Company;
- (14) Mortgage or deed of trust, dated April 19, 1897, executed by Kennett and Osceola Railroad Company to Union Trust Company of St. Louis as Trustee, to secure First Mortgage Bonds of said Kennett and Osceola Railroad Company;
- (15) Mortgage or deed of trust, dated July 1, 1899, executed by Southern Missouri and Arkansas Railroad Company to Irving M. Dittenhoefer and Roderick E. Rombauer as Trustees, to secure First Mortgage Bonds of said Southern Missouri and Arkansas Railroad Company;
- (16) Mortgage or deed of trust, dated June 12, 1899, executed by Chester, Perryville and Ste. Genevieve Rail-[fol. 651] way Company to Lincoln Trust Company, as Trustee, to secure First Mortgage Bonds of said Chester, Perryville and Ste. Genevieve Railway Company;
- (17) Agreement dated October 1, 1902, executed by Railway Construction and Improvement Company, Old Colony Trust Company and St. Louis and San Francisco Railroad Company to secure First Mortgage Bonds of Birmingham Belt Railroad Company;
- (18) Trust agreement, dated September 3, 1912, executed by St. Louis and San Francisco Railroad Company to The Equitable Trust Company of New York, as Trustee, to secure Two Year Secured Six Per Cent. Gold Notes of said St. Louis and San Francisco Railroad Company;
- (19) Trust agreement, dated June 1, 1911, executed by St. Louis and San Francisco Railroad Company to Old Colony Trust Company as Trustee, to secure Two Year Secured Five Per Cent. Gold Notes of said St. Louis and San Francisco Railroad Company;

- (20) Trust Agreement, dated February 27, 1907, executed by The Chicago, Rock Island and Pacific Railway Company and St. Louis and San Francisco Railroad Company to Mercantile Trust Company as Trustee, to secure First Mortgage Gold Bonds of Rock Island-Frisco Terminal Railway Company;
- (21) Equipment Trust Indenture, dated April 1, 1906, between Blair & Co., St. Louis and San Francisco Railroad Company and Bankers Trust Company as Trustee, to secure Equipment Gold Notes, Series G, of said St. Louis and San Francisco Railroad Company;
- (22) Equipment Trust Indenture, dated November 1, 1906, between First Trust and Savings Bank, Chicago, Ill., and St. Louis Union Trust Company, St. Louis, Mo., Trustees, St. Louis and San Francisco Railroad Company, and American Car and Foundry Company, to secure Equipment Gold Notes, series I of said St. Louis and San Francisco Railroad Company;
- (23) Equipment Trust Indenture, dated June 1, 1906, between The Pullman Company and St. Louis and San Francisco Railroad Company, to secure Equipment Gold Notes, Series J, of said St. Louis and San Francisco Railroad Company;
- (24) Equipment Trust Indenture, dated October 27, 1906, between St. Louis Union Trust Company, St. Louis, [fol. 652] Mo., Trustee, St. Louis and San Francisco Railroad Company, and American Car and Foundry Company, to secure Equipment Gold Notes, Series K, of said St. Louis and San Francisco Railroad Company;
- (25) Equipment Trust Indenture, dated August 1, 1907, between St. Louis Union Trust Company, St. Louis, Mo., Trustee, St. Louis and San Francisco Railroad Company, and American Car and Foundry Company, to secure Equipment Gold Notes, Series L, of said St. Louis and San Francisco Railroad Company;
- (26) Equipment Trust Indenture, dated August 1, 1907, between The Pullman Company and St. Louis and San Francisco Railroad Company, to secure Equipment Gold

Notes, Series M, of said St. Louis and San Francisco Railroad Company;

- (27) Equipment Trust Indenture, dated July 1, 1909, bebetween Central Trust Company of New York, Trustee, and St. Louis and San Francisco Railroad Company, to secure Equipment Gold Notes, Series N, of said St. Louis and San Francisco Railroad Company;
- (28) Equipment Trust Indenture, dated January 11, 1908, between The Provident Life and Trust Company of Philadelphia, Pa., Trustee, and St. Louis and San Francisco Railroad Company, to secure Equipment Gold Certificates, Series O, of said St. Louis and San Francisco Railroad Company;
- (29) Equipment Trust Indenture, dated October 1, 1909, between Bankers Trust Company, Trustee, and St. Louis and San Francisco Railroad Company, to secure Equipment Gold Notes, Series P, of said St. Louis and San Francisco Railroad Company;
- (30) Equipment Trust Indenture, dated August 1, 1910, between Central Trust Company of New York, Trustee, and St. Louis and San Francisco Railroad Company, to secure Equipment Gold Notes, Series Q, of said St. Louis and San Francisco Railroad Company;
- (31) Equipment Trust Indenture, dated December 1, 1910, between United States Express Company, Trustee, and St. Louis and San Francisco Railroad Company, to secure Equipment Gold Notes, Series R, of said St. Louis and San Francisco Railroad Company;
- (32) Equipment Trust Indenture, dated October 1, 1911, between Guaranty Trust Company of New York, Trustee, [fol. 653] and St. Louis and San Francisco Railroad Company, to secure Equipment Gold Notes, Series S, of said St. Louis and San Francisco Railroad Company;
- (33) Equipment Trust Indenture, dated September 2, 1912, between Columbia-Knickerbocker Trust Company, Trustee, and Frisco Construction Company, to secure Equipment Gold Notes, Series A, of said Frisco Construction Company;

(34) Equipment Trust Indenture, dated September 16, 1912, between The New York Trust Company, Trustee, and Frisco Construction Company, to secure Equipment Gold Notes, Series B, of said Frisco Construction Company.

Subject also to the express condition that the Purchasers, or their successors or assigns, shall pay, satisfy and discharge:

- (A) Any unpaid compensation which has been or shall be allowed to the Special Master appointed in said consolidated cause, or in any of the constituent causes, any unpaid compensation that has been or shall be allowed to the Receivers in said consolidated cause, or their solicitors, and also any unpaid indebtedness and liabilities of the Receivers incurred in said consolidated cause, or in any of the constituent causes, in the management or operation of the property purchased and otherwise in the discharge of their duties as such Receivers between May 27, 1913, the date of their appointment, and the date of the delivery by the Receivers of possession of the property conveyed or intended so to be;
- (B) Any unpaid claims of creditors of the Railroad Company which have been or shall be admitted by the parties in interest or adjudged by said Court to be prior in lien or superior in equity to the Refunding Mortgage or to General Lien Mortgage of the Railroad Company;
- (C) All just and legal indebtedness of the Railroad Company, payment of which was authorized by the order of said Court appointing the Receivers in said consolidated cause or in any constituent cause, and which shall not at the time of delivery by the Receivers of possession of the property hereby conveyed, or intended so to be, have been paid or satisfied; to the extent that they have not been paid or shall not have been paid out of moneys in possession of the Receivers.

Subject also to the paramount lien and charge reserved by said Court upon said property, for the payment into said Court in cash of the unpaid part of the purchase price. [fol. 654] Subject also to all other terms, conditions and reservations of said Final Decree and of said Order of Confirmation, whether in this Indenture expressly referred to or not.

And this Indenture further witnesseth:

That St. Louis and San Francisco Railroad Company, party of the second part, in consideration of the sum of ten dollars (\$10), lawful money of the United States, to it paid receipt whereof is hereby acknowledged, and pursuant to the directions in said Final Decree and in said Order of Confirmation contained, has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred and set over and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer and set over unto said St. Louis-San Francisco Railway Company, party of the seventh part, all and singular said railroads, property, rights, franchises, privileges, immunities and appurtenances to the same belonging, rolling stock, property and premises, securities and stocks, above described and hereby conveyed by the Special Master, or intended so to be:

To have and to hold, possess and enjoy, all and singular the property, real and personal, rights franchises, privileges and immunities thereto appertaining above described and hereby conveyed by the Special Master, or intended so to be, unto said St. Louis-San Francisco Railway Company, its successors and assigns, to its and their own proper use, benefit and behoof forever.

And this indenture further witnesseth:

That James W. Lusk, William C. Nixon and William B. Biddle as Receivers as aforesaid, parties of the third part, in consideration of the premises and of the sum of ten dollars (\$10), lawful money of the United States, to each of them in hand paid, receipt whereof is hereby acknowledged, and pursuant to the directions in said Order of Confirmation contained, have conveyed and assigned and by these presents do convey and assign unto said St. Louis-San Francisco Railway Company, party of the seventh part, all their right, title and interest as such Receivers in and to any of said property, real or personal, vested or standing in their names or to which they have acquired title as such Receivers;

To have and to hold, possess and enjoy all and singular said property unto said St. Louis-San Francisco Railroad Company, its successors and assigns, to its and their own proper use, benefit and behoof forever.

[fol. 655] And this indenture further witnesseth:

That Guaranty Trust Company of New York, as trustee under the Refunding Mortgage of the Railroad Company dated June 20, 1901, party of the fourth part, in consideration of the premises and of the sum of ten dollars (\$10), lawful money of the United States, to it paid, receipt whereof is hereby acknowledged, and pursuant to the directions in said Final Decree and said Order of Confirmation contained, has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release, to said St. Louis-San Francisco Railway Company, party of the seventh part, all its right, title and interest under said Refunding Mortgage of, in and to all the property, real and personal, above described and hereby conveyed, assigned or transferred by the Special Master or intended so to be:

To have and to hold, possess and enjoy, all and singular said property, unto said St. Louis-San Francisco Railway Company, its successors and assigns, to its and their own

proper use, benefit and behoof forever.

And this indenture further witnesseth:

That Bankers Trust Company and Neill A. McMillan, as trustees under the General Lien Mortgage of the Railroad Company dated August 27, 1907, parties of the fifth part, in consideration of the premises and of the sum of ten dollars (\$10), lawful money of the United States, to them paid, receipt whereof is hereby acknowledged, and pursuant to the directions in said Order of Confirmation contained, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release, to said St. Louis-San Francisco Railway Company, party of the seventh part, all their right, title and interest under said General Lien Mortgage of, in and to all the property, real and personal, above described and hereby conveyed, assigned or transferred by the Special Master, or intended so to be;

To have and to hold, possess and enjoy, all and singular said property unto said St. Louis-San Francisco Railway

Company, its successors and assigns, to its and their own proper use, benefit and behoof forever.

And this indenture further witnesseth:

That Basil B. Elmer and William P. Philips, parties of the sixth part, being the purchasers as joint tenants and not as tenants in common, at the sale of the property sold [fol. 656] under said Final Decree and by this indenture conveyed by the Special Master to said St. Louis-San Francisco Railway Company, having for a valuable consideration, receipt whereof is hereby acknowledged, assigned, transferred and set over, as hereinbefore recited, unto said St. Louis-San Francisco Railway Company, its successors and assigns, all of their right, title and interest in and to the property hereinbefore described and sold to them as aforesaid, including their right to receive a deed or deeds or other instrument or instruments of conveyance, assignment and transfer of said property, do, in consideration of the sum of ten dollars (\$10), lawful money of the United States, to each of them paid, receipt whereof is hereby acknowledged, join in the execution of this indenture for the purpose of releasing and confirming, and they do herely, release and confirm, unto said St. Louis-San Francisco Railway Company, party of the seventh part, all of their right, title and interest in and to all said property;

To have and to hold, possess and enjoy, all and singular said property unto said St. Louis-San Francisco Railway Company, its successors and assigns, to its and their own

proper use, benefit and behoof forever.

And this indenture further witnesseth:

That said St. Louis-San Francisco Railway Company, party of the seventh part, hereby for itself, its successors and assigns, covenants and agrees with the Purchasers, and with each of them, and this conveyance is on the express condition, that said St. Louis-San Francisco Railway Company, its successors and assigns, will perform, satisfy and discharge each and all of the terms of said Final Decree, of said Order of Confirmation and of any other orders which may be made by said Court, on the part of the purchaser of the property under said Final Decree required to be performed, satisfied and discharged, and will enter appear-

ance in said consolidated cause and will indemnify and forever hold harmless the Purchasers, and each of them, their and each of their heirs, executors and administrators, from and against any and all loss, damage, expense and liability whatsoever, which may have been incurred or which may hereafter be incurred by the Purchasers, or either of them, or by their or either of their heirs, executors and administrators, by reason of their said bid at said sale under said Final Decree or the acceptance of said bid or by reason of any acts ar things required by said Final Decree or by said Order of Confirmation or by any other order made by said Court, to be assumed and performed by the Purchasers or [fol. 657] by said St. Louis-San Francisco Railway Company, or otherwise arising out of or connected with their acquisition or transfer of any property by them purchased as hereinbefore recited, or by reason of any acts done or suffered or permitted to be done by them; and this conveyance and transfer is made subject to the performance by said St. Louis-San Francisco Railway Company of the foregoing covenants and the same are hereby made a charge upon all the railroads, franchises and other property hereby conveyed, assigned or transferred, or intended so to be, prior to any mortgage or other lien which may be created by said St. Louis-San Francisco Railway Company thereon.

No personal covenant or liability shall be implied against or is assumed or undertaken by the Special Master, the Receivers, the Refunding Trustee, the General Lien Trustees or either of them, the Purchasers or either of them, or any of said parties, by reason of the execution of this indenture

or any recital or covenant herein contained.

The fact of purchase and the acceptance of this indenture by the Railway Company shall not be construed as an election to accept any contract, agreement or lease sold as part of the property offered pursuant to said Final Decree or embraced herein, and nothing in this indenture contained shall be construed to constitute an assumption or adoption by the Railway Company of any lease or contract made by the Railroad Company or by the Receivers as part of the property embraced herein except the lease and supplement thereto referred to in Order 66 of said consolidated cause; but the Railway Company shall have the right for a period of six months after the delivery this indenture to elect

whether or not to assume or adopt any lease or contract made by the Railroad Company or by the Receivers as part of the property embraced herein, except said lease and supplement, and, except as aforesaid, the Railway Company, its successors or assigns, shall be held not to have adopted or assumed any lease or contract in respect of which the Railway Company shall not have filed written election to assume or adopt the same with the Clerk of the United States District Court for the Eastern Division of the Eastern District of Missouri, within said period of six months, or within such additional period as said Court may hereafter by its order or decree permit.

In order to facilitate the recording of this indenture, — originals thereof have been executed, acknowledged and de[fol. 658] livered, each of which shall be deemed to be an original and all of which together shall constitute one and

the same instrument.

In witness whereof, the Special Master, the Receivers, said Neill A. McMillan as one of the General Lien Trustees, and the Purchasers, have hereunto set their hands and seals, and the Railroad Company, Guaranty Trust Company of New York as Refunding Trustee, Bankers Trust Company of New York as one of the General Lien Trustees, and the Railway Company, have caused this indenture to be executed in their respective names by their presidents or vice-presidents, and under their corporate seals, attested by their secretaries or assistant secretaries, all as of the day and year first above written.

— — — , Special Master. (L. S.)

Signed, sealed and aclivered by Thomas T. Fauntleroy in the presence of ————.

"Here follows the signatures and acknowledgments in proper form of all parties to said Deed, Exhibit A."

### Ехнівіт В

Indenture, dated September —, 1916, between Thomas T. Fauntleroy, as Special Master, appointed by an order entered in the consolidated cause hereinafter mentioned June

8, 1916, to be the Special Master referred to in the Final Decree made and entered in said consolidated cause March 31, 1916 (hereinafter called the Special Master), party of the first part;

St. Louis and San Francisco Railroad Company, a corporation organized and existing under the laws of the State of Missouri (hereinafter called the Railroad Company),

party of the second part;

James W. Lusk, William C. Nixon and William B. Biddle, as Receivers of the property of the Railroad Company appointed in said consolidated cause (hereinafter called the

Receivers), parties of the third part;

Bankers Trust Company, a corporation organized and existing under the laws of the State of New York, and Neill A. McMillan, a resident and citizen of the State of Missouri, as [fol. 659] trustees under the General Lien Mortgage of the Railroad Company, dated August 27, 1907, (hereinafter called the General Lien Trustees), parties of the fourth part; and

Basil B. Elmer and William P. Phillips, as joint tenants and not as tenants in common (hereinafter called the Pur-

chasers), parties of the fifth part.

Whereas in a certain consolidated cause pending in the District Court of the United States for the Eastern District of Missouri, Eastern Division, entitled "North American Company, Complainant, against St. Louis and San Francisco Railroad Company, Defendant, in Equity No. 4174, Consolidated Cause, Final," there was made and entered on March 31, 1916, a Final Decree, whereby, as amended, nunc pro tune as of March 31, 1916, by an order entered in said consolidated cause May 15, 1916, among other things it was ordered, adjudged and decreed that all property of every character and description of the Railroad Company, including all property of every kind and description acquired or held by the Receivers in said consolidated cause, should be sold in the manner and subject to the provisions in said Final Decree set forth, and that said sale should be made at the roundhouse, near the point where the mortgaged lines of railroad of the Railroad Company cross the line of Chouteau Avenue in the City of St. Louis in the State of Missouri upon the property to be sold, on a day and at an hour to be fixed by the Special Master, or as the

Court might order, and that notice of the time and place and terms of sale, describing briefly the property to be sold, and referring to said Final Decree, should be published at least once a week for four successive weeks preceding the date of such sale, in a newspaper printed, regularly issued and having a circulation in the City of St. Louis, and State of Missouri, and in a newspaper published in the Borough of Manhattan, City of New York, State of New York; and

Whereas by said Final Decree it was also, among other things, ordered, adjudged and decreed that the Railroad Company, or some one in its behalf, should, within thirty days after the entry of said Final Decree, pay or cause to be paid to Guaranty Trust Company of New York, as Trustee, for the use and benefit of the holders of the outstanding Refunding Bonds of the Railroad Company, and of the coupons appertaining thereto which matured July 1. 1914, the sum of Seventy-four million, eight hundred and twenty-three thousand, one hundred and nine and 74/100 dollars (\$74.823,109.74) in gold coin of the United States of America, with interest thereon at the rate of six per [fol. 660] cent per annum from the date of the entry of said Final Decree to the date of payment, and that within the same time the Railroad Company, or some one in its behalf, should also pay or cause to be paid to Bankers Trust Company and Neill A. McMillan, as trustees, for the use and benefit of the holders of the outstanding General Lien Bonds of the Railroad Company, and of the coupons appertaining thereto which matured May 1, 1914, and November 1, 1914, respectively, the sum of Seventy-eight million, fifty-seven thousand dollars (\$78,057,000) in gold coin of the United States of America, with interest thereon at the rate of six per cent per annum, from the date of the entry of said Final Decree to the date of payment; and

Whereas neither the Railroad Company nor anyone in its behalf has paid or caused to be paid either of said sums or any sums, although more than thirty days have elapsed

since the entry of said Final Decree; and

Whereas, Thomas T. Fauntleroy was, by an order entered in said consolidated cause June 8, 1916, appointed to be the Special Master referred to in said Final Decree, and by said Final Decree was directed to make and conduct said sale and to execute a deed or deeds or other instrument or instruments of conveyance or assignments and transfer of the property sold to the purchaser or purchasers thereof, or his or their assigns, upon an order confirming such sale, and upon payment or settlement of the purchase price, or making provisions therefor, as in said Final Decree provided, or as might be permitted by any order or other decree made in said consolidated cause; and

Whereas July 19, 1916, at twelve o'clock, noon, was duly fixed by the Special Master as the day and hour for the said sale and notice of the time and place and terms of sale was duly given in accordance with the provisions of said Final

Decree and in accordance with law: and

Whereas the Special Master on said July 19, 1916, at twelve o'clock, noon, at the round house near the point where the mortgaged lines of railroad of the Railroad Company cross the line of Chouteau Avenue in the City of St. Louis in the State of Missouri upon the property to be sold, pursuant to and in accordance with all the provisions of said Final Decree, sold at public auction to the Purchasers, as joint tenants and not as tenants in common, all property of every kind and description of the Railroad Company, including all property of every kind and description acquired or held by the Receivers in said consolidated cause, [fol. 661] in parcels and for prices as follows:

- (1) The property embraced in the Collateral Trust Agreement of June 1, 1911, securing the Two Year Five Per Cent Secured Gold Notes of the Railroad Company, separately and as an entirety, for the sum of \$10,
- (2) The property embraced in the Trust Agreement of September 3, 1912, securing the Two Year Six Per Gold Notes of the Railroad Company, separately and as an entirety, for the sum of \$10,
- (3) The securities pledged to secure the promissory note of the Railroad Company held by North American Company, separately and as an entirety, for the sum of \$600,000, and
- (4) All the remaining property of every character and description of the Railroad Company, as an entirety, for the sum of \$45,700,200,

the Purchasers being the highest bidders for all the various parcels of said property at said sale and having duly qualified as bidders thereat for each parcel in the manner provided in said Final Decree; and

Whereas the Special Master did after said sale and on or about July 19, 1916, make a report of said sale to the District Court of the United States for the Eastern Division of the Eastern District of Missouri and said report was duly filed in the office of the Clerk of said Court on said day; and

Whereas thereafter, by an order duly made and entered——, 1916, by said District Court of the United States for the Eastern Division of the Eastern District of Missouri in said consolidated cause, hereinafter called the Order of Confirmation, said report was in all things confirmed, and the sale to the Purchasers of all said property was made final and absolute, and said Court directed the manner in which the purchase price of each of said several parcels should be paid or provided for; and

Whereas that portion of the purchase price of each of said parcels required to be paid in advance of the delivery of instruments of conveyance and transfer has been so paid or settled or provision for the payment thereof has been made in manner approved by said Court, all as by said

Order of Confirmation provided; and

[fol. 662] Whereas the Purchasers have duly assigned, transferred and set over unto St. Louis-San Francisco Railway Company all of their right, title and interest, in and to a part of the property sold to them as aforesaid, including their right to receive a deed or deeds or other instrument or instruments of conveyance, assignment and transfer of said part of said property as provided in said Final Decree, and by indenture of even date herewith said part of said property has been conveyed, assigned and transferred to said St. Louis-San Francisco Railway Company; and

Whereas by said Order of Confirmation the form of this indenture was approved by said Court and the Special Master, the Railroad Company and the Receivers were directed to execute and deliver an indenture in the form

hereof;

Now, therefore, this indenture witnesseth:

That said Thomas T. Fauntleroy, as Special Master as aforesaid, party of the first part, in order to carry into effect said sale and in pursuance of said Final Decree and said Order of Confirmation and in consideration of the aforesaid payment of and provision for the purchase price. the receipt of which is hereby acknowledged, has granted. bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred and set over and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer and set over unto Basil B. Elmer and William P. Philips parties of the fifth part, as joint tenants and not as tenants in common, the following property of St. Louis and San Francisco Railroad Company, including every interest therein acquired and held by James W. Lusk, William C. Nixon and William B. Biddle as Receivers in said consolidated cause:

A. The property embraced in the Collateral Trust Agreement of June 1, 1911, from the Railroad Company to Old Colony Trust Company, as Trustee, securing the Two Year Five Per Cent Secured Gold Notes of the Railroad Company, being:

- (a) \$2,500,000 St. Louis and San Francisco Railroad Company Common Stock Trust Certificates, issued in respect of Chicago and Eastern Illinois Railroad Company's Common Stock;
- (b) \$1,490,000 of The Kansas City, Fort Scott and Memphis Railway Company Guaranteed Four Per Cent Preferred Stock Trust Certificates; [fol. 663] (c) \$100,000 General Lien Bonds of the Railroad Company.
- B. The property embraced in the Trust Agreement of September 3, 1912, from the Railroad Company to The Equitable Trust Company of New York, as Trustee, securing the Two Year Six Per Cent Secured Gold Notes of the Railroad Company, being:
- (a) 20,000 shares stock of New Orleans, Texas and Mexico Railroad Company;

- (b) \$4,229,185.09 promissory notes of said last named Company and all other indebtedness of said last named Company to the Railroad Company, except New Orleans, Texas and Mexico Division First Mortgage Bonds:
- (c) 14,000 shares preferred stock of the Kirby Lumber Company;
- (d) 700 shares stock of the San Benito & Rio Grande Valley Railway Company;
- (e) \$625,495 Six Per Cent First Mortgage Bonds of said last named Company;
- (f) All other indebtedness of said last named Company to the Railroad Company.
- C. The securities pledged to secure the promissory note of the Railroad Company held by the North American Company, being:
- (a) \$8,000,000 Stock New Mexico and Arizona Land Company;
- (b) \$5,000,000 First Mortgage Bonds New Mexico and Arizona Land Company;
- (c) \$200,000 St. Louis and San Francisco Railroad Company, New Orleans, Texas and Mexico Division First Mortgage Bonds.
- D. Real Estate, held in the name of trustees, in the Cities of Oklahoma City, Oklahoma; Baton Rouge, Louisiana; Memphis, Tennessee; Dallas, Texas; North Birmingham, Alabama; Tower Grove, Missouri; Taylor City, Missouri; Muskogee, Oklahoma; Joplin, Missouri; Springfield, Missouri; Hulbert, Arkansas; Gratiot, Missouri; Delta, Missouri; and in Menard County, Texas. The following is a description of said real estate and a statement of the trustees in whose names such real estate is held and of the names of the grantors and the places of record of the deeds [fol. 664] under which said real estate was acquired:

Real Estate Held in the Name of William F. Evans, as Trustee: Here follows description of said real estate.

(Omitted to top of page 45 as per stipulation, filed Aug. 26, 1924.)

E. Stock in the following amounts in companies hereinafter named:

Company	Par amount
Red River, Texas and Southern Railway Com- pany Union Terminal Railway Company—Dallas New Orleans, Mobile & Chicago Railroad Com- pany	\$399,300 6,000 2,601,870.51
Arkansas Coal & Mining Company Kirby Lumber Company Preferred Stock Intermittent Vacuum Precooling Company of	11,250 65,000
Texas Crescent Hotel Company Hotel Realty Company Jasper Land Company Star Publishing Co., Ft. Worth	60,000 15,198 5,000 8,666.67 200
F. The following corporate bonds and obliga-	ations:
Company	Amount
New Orleans, Mobile & Chicago R. R. Co. First Mortgage Five Per Cent Bonds Cape Girardeau Northern Railway Company First Mortgage Five Per Cent Bonds	\$100,000 16,000
St. Louis Club Second Mortgage Five Per Cent Bonds Rio Grande Railroad Company First Mort-	2,500
Brownsville Street & Interurban Railway Company First Mortgage Six Per Cent	65,000
Bonds San Benito & Rio Grande Valley Railway Com-	20,000
[fol. 665] St. Louis and San Francisco Rail- road Company New Orleans, Texas and Mexico Division First Mortgage Five Day	328,240
Kansas City, Fort Scott & Memphis Railway Company Refunding Mortgage Form Des	254,818.40
Cent Bonds	106,000

Company	Amount
<ul> <li>St. Louis and San Francisco Railroad Company Chicago &amp; Eastern Illinois Common Stock Trust Certificate.</li> <li>St. Louis and San Francisco Railroad Company Equipment Trust Gold Notes:</li> </ul>	20,000
Series A	590,000
Series B	620,000
Series C	550,000
Series D	399,095,19
Series E	423,593.0
Series F	696,000
Series G	1,848,000
Series H	375,000
Series I	1,867,000
Series J	120,144.48
Series K	218,000
Colorado Southern, New Orleans and Pacific	
Railroad Company Equipment trust notes,	
Series A	480,000

To Have And To Hold, possess and enjoy all and singular the above mentioned real and personal property rights. franchises, privileges and immunities thereto appertaining hereby conveyed, or intended so to be, unto said Basil B. Elmer and William P. Philips, as joint tenants, and not as tenants in common, and unto the survivor of them, his heirs and personal representatives, and their and his successors and assigns, to their own proper use, benefit and behoof forever, free and discharged from any trust or lien imposed thereon by the Refunding Mortgage of the Railroad Company and free and discharged from any trust or lien imposed thereon by the General Lien Mortgage of the Railroad Company and free and discharged from all claims, rights, interest or equity of redemption of, in or to the same or by or of the Railroad Company, its successors and assigns, and by or of the creditors and stockholders of the Railroad Company, and by or of all persons claiming by or under or through the Railroad Company, its creditors of its stockholders.

[fol. 666] Subject, however, insofar as the lien of any of the instruments specified in Article Fourth of said Final Decree covers any of said property, to the lien of such instruments, including:

- (1) Trust Agreement, dated September 3, 1912, executed by St. Louis and San Francisco Railroad Company to The Equitable Trust Company of New York, as Trustee, to secure Two Year Secured Six Per Cent Gold Notes of said St. Louis and San Francisco Railroad Company; and
- (2) Trust Agreement, dated June 1, 1911, executed by St. Louis and San Francisco Railroad Company to Old Colony Trust Company as Trustee, to secure Two Year Secured Five Per Cent Gold Notes of said St. Louis and San Francisco Railroad Company.

Subject also to all the terms, conditions and reservations of said Final Decree and of said Order of Confirmation whether in this Indenture expressly referred to or not.

And This Indenture Further Witnesseth:

That St. Louis and San Francisco Railroad Company, party of the second part, in consideration of the sum of ten dollars (\$10), lawful money of the United States, to it paid, receipt whereof is hereby acknowledged, and pursuant to the directions in said Final Decree and in said Order of Confirmation contained, has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred and set over and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer and set over unto said Basil B. Elmer and William P. Philips, parties of the fifth part, as joint tenants and not as tenants in common, all and singular said property above described and hereby conveyed by the Special Master, or intended so to be;

To Have and To Hold, possess and enjoy, all and singular said property hereby conveyed by the Special Master, or intended so to be, unto said Basil B. Elmer and William P. Philips, as joint tenants and not as tenants in common, and unto the survivor of them, his heirs and personal representatives and their and his successors and assigns, to their

own proper use, benefit and behoof forever.

And This Indenture Further Witnesseth:

That James W. Lusk, William C. Nixon and William B. Biddle as Receivers as aforesaid, parties of the third part, in consideration of the premises and of the sum of ten [fol. 667] dollars (\$10), lawful money of the United States, to each of them in hand paid, receipt whereof is hereby acknowledged, and pursuant to the directions in said Order of Confirmation contained, have conveyed and assigned and by these presents do convey and assign unto said Basil B. Elmer and William P. Philips, parties of the fifth part, as joint tenants and not as tenants in common, all their right, title and interest as such Receivers in and to any of said property, real or personal, vested or standing in their names or to which they have acquired title as such Receivers;

To Have And To Hold, possess and enjoy all and singular said property unto said Basil B. Elmer and William P. Philips, as joint fenants and not as tenants in common, and unto the survivor of them, his heirs and personal representatives and their and his successors and assigns, to their own proper use, benefit and behoof forever.

And This Indenture Further Witnesseth:

That Bankers Trust Company and Neill A. McMillan, as trustees under the General Lien Mortgage of the Railroad Company dated August 27, 1907, parties of the fourth part, in consideration of the premises and of the sum of ten dollars (\$10), lawful money of the United States, to them paid, receipt whereof is hereby acknowledged, and pursuant to the directions in said Final Decree and said Order of Confirmation contained, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release, to said Basil B. Elmer and William P. Philips, parties of the fifth part, as joint tenants and not as tenants in common, all their right, title and interest under said General Lien Mortgage of, in and to all the property, real and personal, above described and hereby conveyed, assigned or transferred by the Special Master, or intended so to be;

To Have And To Hold, possess and enjoy, all and singular said property, unto said Basil B. Elmer and William P. Philips, as joint tenants and not as tenants in common, and unto the survivor of them, his heirs and personal repre-

sentatives, and their and his heirs and assigns, to their own

proper use, benefit and behoof forever.

No personal covenant or liability shall be implied against or is assumed or undertaken by the Special Master, the Receivers, or the Purchasers or either of them, or any of said parties, by reason of the execution of this indenture or any [fol. 668] recital or covenant herein contained.

The fact of purchase and the acceptance of this indenture by the Purchasers shall not be construed as an election to accept any contract, agreement or lease sold as part of the property offered pursuant to said Final Decree or embraced herein, and nothing in this indenture contained shall be construed to constitute an assumption or adoption by the Purchasers of any lease or contract made by the Railroad Company or by the Receivers as part of the property embraced herein; but the Purchasers shall have the right for a period of six months after the delivery of this indenture to elect whether or not to assume or adopt any lease or contract made by the Railroad Company or by the Receivers as part of the property embraced herein, and the Purchasers, their successors or assigns, shall be held not to have adopted or assumed any lease or contract in respect of which the Purchasers, or their successors or assigns, shall not have filed written election to assume or adopt the same with the Clerk of the United States District Court for the Eastern Division of the Eastern District of Missouri, within said period of six months, or within such additional period which said Court may bereafter by its order or decree permit.

In order to facilitate the recording of this indenture, originals thereof have been executed, acknowledged and delivered, each of which shall be deemed to be an original and all of which together shall constitute one and the same instrument.

In Witness Whereof, the Special Master, the Receivers and said Neill A. McMillan as one of the General Lien Trustees, have hereunto set their hands and seals, and the Raifroad Company and Bankers Trust Company as one of the General Lien Trustees, have caused this indenture to be executed in their respective names by their presidents or vice-presidents, and under their corporate seal, attested by

their secretaries or assistant secretaries, all as of the day and year first above written.

—, Special Master. (L. S.)

Signed, sealed and delivered by Thomas T. Fauntlerey in the presence of —— —, Attesting Witnesses.

[fol. 669] "Here follows the signatures and acknowledgments, in proper form, of all parties to Exhibit B, incorporated in said decree, confirmed the sale.

Counsel for defendant, in reply to the question whether he would admit that the reorganization plan, a copy of which was introduced at the last hearing, was carried out in the reorganization, with the exception of those departures required by the orders and opinions of the Public Service Commission of Missouri, as shown in Volumes 3 and 4 of the reports of the Public Service Commission, stated that he could not admit that (p. 73).

W. F. Evans, called as a witness by interveners, testified as follows:

Mr. Murphy: Mr. Evans, you need not be sworn. I just want to ask you a few questions. A plan for the reorganization of the St. Louis and San Francisco Railroad Company property was filed in the District Court here in St. Louis. Afterwards applications were filed before the Public Service Commission of Missouri for a permit to issue securities on the basis of the plan. My recollection is the evidence shows that in its first opinion the Public Service Commission ruled out two features of the plan, one relative to the placing of stock of the new company in the hands of a voters' trust. I don't remember what the other was. What I would like to ask you is this; Was the reorganization finally consummated on the basis of the plan, with the changes or change, whatever it may be, required by the Public Service Commission of Missouri?

Mr. Evans: I am unable to answer that. The reorganization plan was prepared by New York Counsel, and whatever was done in carrying it out, or in complying with its

provisions, was under the direction of New York Counsel,

and I am unable to tell you what was done.

Witness further testified that New York Counsel represented the reorganization management, as far as he was advised; that was Speyer & Company; that he did not know in a general way that that plan was carried out; that he could not say; that he presumed it was, but he did not know whether it was; that he knew of no other plan having been filed, and that as far as he knew, there was a reorganization (p. 75).

[fol. 670] Mr. Murphy: Will you examine those deeds, and if any changes were made read into the record what the

changes were?

Mr. Miller: You have copies of those things. I think you ought to assume that burden.

Mr. Murphy: We haven't any copies of the deeds.

Mr. Miller: Well, we will find copies of the deeds for you. I don't want to assume the responsibility of doing that.

Mr. Murphy: Well, I offer in evidence the deeds conveying this property from the purchaser or assignee under the reorganization plan, and then the order confirming the sale under the final decree.

Admitted subject to objection. To which ruling of the Master the defendant then and there duly excepted.

Said deeds, offered as Interveners, Exhibit 23, are in words and figures as follows, to-wit;

Said deeds omitted here as same are identical with Ex.

A and B attached to Interveners' Ex. 22 supra.

Counsel for interveners and for defendants agreed for the purposes of the record, that a stipulation was entered into that cause 4320 in the District Court of the United States for the Western Division of the Western District of Missouri, would abide the result of the appeal in cause No. 4308 pending in the same court (p. 76).

Counsel for intervener- offered the inventory showing the amount of supplies and material on hand at the time of

the appointment of the receivers.

Mr. Miller: That is objected to for the same reason as contained in the answers, is wholly immaterial.

The Master: It is admitted-subject to the objection.

To which ruling of the Master the defendant then and there duly excepted and still except- (p. 77).

Inventory offered as interveners' Exhibit 24 is in words and figures as follows, to-wit:

[fol. 671]

INTERVENERS' EXHIBIT 24

File 1224-3

St. Louis, August 13th, 1913.

D1.

Messrs, T. H. West, W. C. Nixon, W. B. Biddle, Receivers, Building.

GENTLEMEN: As requested in your advice of May 28th, last, I submit herewith the complete inventory, in duplicate, of the property of the 8t Louis & San Francisco Railroad Company, transferred to the Receivers at May 28th, 1913, as required to be filed by the Receivers with the Special Master, in accordance with order of the Court.

I have not gone over the details of this with our Counsel, but will do so

when he returns,

The exhibits "A" to "J." inclusive, are in a package of rather large size, which I will transmit to you at any time you may desire them.

Yours very truly, A, Douglas,

AD-f.

Inventory of Property of the St. Louis and San Francisco Railroad Company Transferred to Receivers at May 28th, 1913

St. Louis and San Francisco R. R. main and side track mileage	Miles first main track owned	Miles second track owned	track	Miles trackage rights operated
St. Louis, Mo., to Oklahoma City, Okla.	543.09	16.55	251,97	
Sapulpa, Okla., to Texas State Line	192.81	111,,	50,55	
Monett, Mo., to Red River	286, 13		65.31	100
Pierce City, Mo., to Ellsworth, Kan	323,80	****	69.02	****
Springfield, Mo., to Kansas City, Mo.,	189,49	****	44.46	
Beaumont, Kan., to Blackwell, Okla	49.73		9.33	
Girard, Kan., to Galena, Kan	46,93		1147 1949	
Oronogo, Mo., to Joplin, Mo	9.32		6,69	
Springfield, Mo., to Chadwick, Mo	34.86		6.99	
Cuba Jet., Mo. to Salem, Mo. and			11,110	4414
Branches	59,54		12.02	****
Rogers, Ark., to Grove, Okla	47.16		3.73	
Fayetteville, Ark., to Pettigrew, Ark.,	41.32		4.65	
Jenson, Ark., to Mansfield, Ark	18.34		19.44	****
Pitsburg, Kan., to Weir City, Kan., and			*****	
Mines	10.48		8.63	
Springfield Connecting Railway	2.93		1.58	
Granby, Mo., to Granby Mines	1.50		1.09	1797
Blackwell, Okla., to South Bank Red				
River	238,68		40.38	****
Oklahoma City (Okla.) to South Bank				
Red River	174.85		27.94	****
Hope, Ark., to Ardmore, Okla	223,50		42.79	1211
Scullin, Okla., to Sulphur Springs, Okla.	8.72		1.20	****
Mead Jet., Okla., to Platter, Okla. (now				
Kiersey, Okla., to Texas Jct., Okla.)	0.24		1,09	***

St. Louis and San Francisco R. R. main and side track mileage	Miles first main track owned	Miles second track owned	track	Miles trackage rights operated
Fayetteville, Ark., to Okmulgee, Okla., A. V. & W. Jet., to Avard, Okla., Avard, Okla., to Waynoka, Okla., S. E. Jet., Mo., to Luxora, Ark., Nash, Mo., to Hoxie, Ark., (fol. 6721 Mingo, Mo., to Hunter, Mo.,	9,70 $241,70$		18.93 26.94 77.66 17.57 3.59	9.70
Hayti, Mo., to Grassy Bayou (via Caruthersville) Gulf Jet., Mo., to Leachville, Ark Clarkton, Mo., to Malden, Mo Kennett, Mo., to Hayti, Mo Wardell, Mo., to Deering, Mo			3,55 18,20 1,63 1,94 1,30	****
Zahma, Mo., to Aquilla, Mo	18, 40 56,00 10,70 3,536,47	16,55	. 62 5.73  878.14	13,88
Leasehold Estates:		-	95.00	-
Kansas City, Ft. Scott and Memphis Ry. Kansas City, Mo., to Arcadia, Kan. Springfield, Mo., to Memphis, Tenn. Linton, Kan., to Rich Hill, Mo Tyronza Jet., Ark., to Station 461, Ark. Edward, Kan., to Webb City, Mo	117.00 285.78 20.78 11.40 80.17	23,30	97.87 115.91 6.99 3.17	****
Arcadia, Kan., to Cherryvale, Kan. Weir Jet., Kan., to Weir City, Kan. Bomerville, Ark., to Algon, Ark. (MP 447)	74,50 3,94 35,75 37,67		37,33 8,56 5,58 3,15	* * * *
Greenfield, Mo., to Aurora, Mo Baxter, Kan., to Miami, Okla Deckerville, Ark., to Luxora, Ark Willow Springs, Mo., to Grandin.	13.07 36,30 81.95	* * * * * * * * * * * * * * * * * * *	2.93 11.85 8.82	****
Mo. Jacques Jet., Extension, Kan., Arcadia, Kan., to Springfield, Mo., Evadale, Ark., to Turrell, Ark., Marion, Ark., to Hulbert, Ark.,	13.09 1.06 85.00 16.50 5.49		1.62 .92 16.01 5.72 .05	****
	919,45	23,90	398,01	****
Kansas City, Memphis and Birmingham Ry. Memphis, Tenn., to Birmingham,	265,51	****	111.55	
Ala. Pratt City, Ala., to Bessemer, Ala.	11.06	****	3.34	****
	285,66		118.27	
Grand Total	4.741.58	40,45	1,394,42	13,88

In addition to the above there is material in Temporary Side Tracks at various points valued at \$20,796,22, (See Exhibit "J.")

And in Temporary Telegraph Line between Dallas and Houston, Tex., valued at \$4,770,73.

Also all Freight and Passenger Stations, Fuel Stations, Section Houses, Round-Houses, and all other buildings and structures situated thereon and pertaining thereto, with all Furniture and Fixtures therein.

[fol. 673] Also the following Locomotive and Car Repair Shops, with full complement of Tools and machinery therein:

Springfield, Mo.—North Shops. Springfield, Mo.—South Side Shops. Springfield, Mo.—North Side (new) Shops. Kansas City, Mo.—Shops. Memphis, Tenn.—Shop. Birmingham, Ala.—Shops.

Mechanical Department "Patterns," located at the under-noted points;

Scullin & Gallagher Foundry, St. Louis, Mo. Hewitt Mfg. Co. Foundry, St. Louis, Mo. United Iron Works Foundry, Springfield, Mo. Livermore Foundry, Memphis, Tenn.

Land in the following counties, as per books in the Land Department:

 Maries County, Mo.
 1.410
 Acres

 Phelps County, Mo.
 22,876
 Acres

 Pulaski County, Mo.
 29,254.87
 Acres

 McDonald County, Mo.
 840
 Acres

 Benton County, Ark
 1,547.64
 Acres

 55,928,51
 Acres

In name of W. F. Evans, Trustee

Rolling Stock Equipment as follows:

Locomotives	Owned subject to equipment trusts	Total No. owned and leased at May 28, 1913
Passenger Cars:  Conches, First Class	* 600 30 3	1.046
Conches, Second Class. SS Chair 59	DE 12 10.	District Con-
Coaches, Second Class	78	157
Chair 59		111
Combination:	339	98
Compiliation .		
Coach and Cafe	6	G
Coach and Mall 23	18	41
Coach, Mail and Baggage 8		8
Coach and Baggage 19	9	28
Mail, Baggage and Express 18	21	2214
Baggage and Express 67	45	112
Cafe Club	31	**
Buffet Club	4	4
Postal 16	* 5 * 5	338
Official 19		19
Dining	11	11
Grill 2		12
Observation, Cafe 6	6	12
Fruit (Passenger) 7		7
Gasoline—Electric	6	6
Express Refrigerator	25	25
		1
Grain Exhibit 1		-
Total Passenger Cars 412	293	705
	250 303 520	

[fol. 674] Freight Cars:	Number owned	Owned subject to equipment trusts	Total No. owned and leased at May 28, 1913
Box	5.505	9.173	14.678
Antomobile	102	548	650
Furniture	279	1.114	1,390
Stock	136	983	1.119
Coal	4.163	7.280	4
	375	497	11,443
Flat	56	•	872
Refrigerator	4	* * *	56
		500	504
Coke	5	50	55
Tank	1	497	498
lee (Commercial)	256		256
Combination Stock and Coal		-1:01)	499
Caboose	-1:1-1	220	4.5.5
*	-		
Total Freight Cars	11,117	21,361	32.478
	===	-	
Miscellaneous Cars:			
Steam Wrecker			_
Derricks	-1	::	7
	12	2	11
Pile Drivers			i i
Steam Shovels	11		11
Ditchers	8	* * *	8
Ballast Spreaders			• 1
Rodger Plows	5		ā
Ledgerwood Ballast Unloaders	8		8
Rail Loaders	1		1
Rail Curvers	1		1
Snew Plows	1		1
Gas Transports	33		33
Water Cars	59		59
Tool and Material Cars (Miscellane-			****
ons)	295		291).5
Boarding Cars	773	111	7.63
Supply Cars	:3		::
Scale Testers	6		11
Ballast Cars	521	341	862
Cinder Cars	80		
Locomotive Coaling Cranes	8		80
Weed Burners	5		11
Air Compressors	ī		2
lee (Company)			1
	4		4
Total Miscellaneous Cars	1,818	349	2,167
	111		
	13,347	22,003	35,350
Grand Total Engineer and Co.	A Lumin		
Grand Total, Engines and Cars	14,058	22,338	36,396

[fol.675] Office Furniture and Fixtures off the Line of Railroad at points as follows:

In General Office, on 10th and 11th floors, 71 Broadway, New York, N. Y. In General Office, on 6th to 13th floors, 9th and Olive streets, St. Louis, Mo.

General Office Building, Jefferson and Olive streets, Springfield, Mo. Freight and Passenger Office, St. Louis, Mo., joint with C. & E. I. R. R. Freight and Passenger Office, Atlanta, Ga., joint with C. & E. I. R. R. Freight and Passenger Office, Birmingham, Ala., joint with C. & E. I. R. R.

Freight and Passenger Office, Cincinnati, Ohio, joint with C. & E. I. R. R. Passenger Office, Chicago, Ill., joint with C. & E. I. R. R.

Freight Office, Chattanooga, Tenn., joint with C. & E. I. R. R.

Freight Office, Clovis, N. M., joint with C. & E. I. R. R.

Freight and Passenger Office, Denver, Colo., joint with C. & E. I. R. R. Passenger Office, Ft. Smith, Ark., Joint with C. & E. I. R. R. Freight and Passenger Office, Jacksonville, Fla., joint with C. & E. I.

Freight and Passenger Office, Joplin, Mo., joint with C. & E. I. R. R. Freight Office, Indianapolis, Ind., joint with C. & E. I. R. R. Freight and Passenger Office, Kansas City, Mo., joint with C. & E. I.

R. R.

Freight and Passenger Office, Los Angeles, Cal., joint with C. & E. I.

Freight Office, Louisville, Ky., joint with C. & E. 1, R. R. Freight and Passenger Office, Memphis, Tenn., joint with C. & E. 1, R. R. Freight Office, Minneapolis, Minn., joint with C. & E. I. R. R.

Freight and Passenger Office, New York, N. Y., joint with C. & E. I. R. R. Freight and Passenger Office, Oklahoma City, Okla., joint with C. & E. I

R. R.

Freight and Passenger Office, Pittsburgh, Pa., joint with C. & E. I. R. R. Freight and Passenger Office, Springfield, Mo., joint with C. & E. I. R. R. Freight Office, San Francisco, Cal., joint with C. & E. I. R. R. Passenger Office, St. Paul, Minn., joint with C. & E. I. R. R. Passenger Office, Wichita, Kan., joint with C. & E. I. R. R.

Freight and Passenger Office, Chicago, Ill., joint with C. & E. I. R. R.

Freight Office, Danville, Ill., joint with C. & E. I. R. R.

Freight Office, Detroit, Mich., joint with C. & E. I. R. R. Freight and Passenger Office, Evansville, Ill., joint with C. & E. I. R. R. Freight Office, Milwaukee, Wis., joint with C. & E. I. R. R. Freight Office, Nashville, Tenn., joint with C. & E. I. R. R.

Freight Office, Nat. Stock Yards, Ill., joint with C. & E. I. R. R.

Freight Office, Salem. Ill., joint with C. & E. I. R. R.

Freight and Passenger Office, Terre Haute, Ind., joint with C. & E. 1. R. R. Freight and Passenger Office, Baton Rouge, La., joint with C. & E. I.

and N. O. T. & M. R. R. Freight and Passenger Office, Beaumont, Tex., joint with C. & E. I.

and N. O. T. & M. R. R. Passenger Office, Corpus Christi, Tex., joint with C. & E. I. and N. O.

T. & M. R. R. Freight and Passenger Office, Dallas, Tex., joint with C. & E. I. and

N. O. T. & M. R. R. Freight and Passenger Office, Ft. Worth, Tex., joint with C. & E. I.

and N. O. T. & M. R. R. Freight and Passenger Office, Houston, Tex., joint with C. & E. I. and

N. O. T. & M. R. R.

Freight and Passenger Office, New Orleans, La., joint with C. & E. I. and N. O. T. & M. R. R.

Freight and Passenger Office, San Antonio, Tex., joint with C. & E. l. and N. O. T. & M. R. R.

Freight Office, New Iberia, La., joint with C. & E. I. and N. O. T. & M. R. R.

Ticket Office-Union, Oklahoma City, Okla., joint with A. T. & S. F. C. R. J. & P. and M. K. & T. R. R.

 $[{\rm fol},676]$  . Material and Supplies on hand in store houses, etc., as per statements showing details marked below:

"A"	Roadway and Transportation Material	\$620,809.11	
"B"	Rail	132,783.01	
"(" ]	Ties	426,531,22	
"1"	Ties at Creosoting Plants	260,758,89	
"1)"	Store Department, Stock "D"	1,254,067.57	
E	Stationery Department, Stock "B"	32,922,57	
F	Maintenance of Equipment Material	663,869,95	
"ij"	Fuel	115,280,23	
"H"	Interchangeable Mileage Credential Stock	714.00	
"I"	Advertising Playing Card Stock	156.48	
			83,507,893,03
	Live Stock, 1 Horse, 1 Mule, cost \$290,00.		

1 Additions raying card racks		
Live Stock, 1 Horse, 1 Mule, cost \$290,00.		\$3,507,893.03
Asset Accounts:		
Cash in Treasury		\$603,849.96
speyer & Co. (New York), Foreign Coupon	1,012,557,50	
Account	601,609,26	
Account	12.073.80	
Coupon Account	6,401.84	
Coupon Account	12,800,00	
eign Coupon Account	116,050,50	
pon Account	180,00	
pon Account	237,50	
eign Coupon Account Equitable Trust Co. (New York), Foreign	2,950,00	
New York Trust Co. (New York). Foreign	1.285,00	
Coupon Account First Trust & Savings Bank (Chicago), For-	7.026,85	
eign Coupon Account	50,00	
Provident L. & T. Co. (Philadelphia). For-	42,350,00	
eign Coupon Account	360,00	
United States Trust Co. (New York) For	270,00	
Union Trust Co. (New York) Trust 5s of	270,00	
Mercantile Trust Co. (New York) Euroign	850,00	
New York Trust Co. (New York) Dividend	1,030.00	
Equitable Trust Co. (New York) C & E	180,00	
I. R. R., Dividend Account	4,293,50	21 000 === ==
		\$1.822.555.75

	Bonds:	
Mercantile Trust Co., New York, Trustee, Mo. Kan. & Colo. Ry	\$5,000.00	
of St. L. & S. F. Ry. A. B. C. Bonds Mercantile Trust Co., New York, Redemp-	1,700.00.	
tion of St. S. & V. B. Br. Co. Bonds New England Trust Co., Boston, Trustee,	1,000,00	
K. C. M. & B. R. R. Notes Union Trust Co., New York, Redemption of	362,50	
St. L. & S. F. R. R. 3-year 5% Notes	2,000,00	10,062,50
Special Deposits:		
Blair & Co., Fire Claims Collections	\$28,230,65	
Pullman Co., Fire Claims Collections	15,877.43	
Bankers Trust Co., Fire Claims Collections	9,573.72	
St. Louis Union Trust Co., Fire Claims Col-		
lections	770.00	
Central State Bank & Trust Co., Memphis	1.076.90	
Mercantile Trust Co. (N. Y.), Trustee under		
K. C. F. S. & M. Ry. Refunding Mortgage Mercantile Trust Co. (St. L.), Bonus Note	2,136.05	
Account	4,731.69	
Marked Tree Bank & Trust Co	400,00	
Comanche Light & Power Co	15.00	
Southwest Missouri Light Co	28.75	
City of St. Louis (Water Deposit)	100.00	
Consolidated Light, Power & Ice Co City of St. Louis (Street Excavation De-	5,00	
posit)	25.00	
American Gas Co. (Columbus, Kan.)	5.00	
City of Carbon Hill, Ala	5.00	
Securities as follows:		62,980,19
Kan, S. W. Ry. Co., Capital		
Stock		
ital Stock		
ital Stock		
Co., Capital Stock Par Value, Frisco Refrigerator Line, Cap-		
ital Stock	5,000.00	
Rio Grande Ry., Capital Stock, Par Value, Paris & Great Nor. R. R. Co.,		
Capital Stock	4,500,00	
Ry. Co., Capital Stock Par Value, Kansas City, Ft. Scott & Mfs.		
Ry., Capital Stock		
R. R. Co., Capital StockPar Value, Kansas City & Memphis Ry.		
and Br. Co., Capital Stock Par Value,	500,00	
St. Louis & San Francisco R. R. Co. 1st Prfd. StockPar Value.		

St. Louis & San Francisco R. R. Co., Common StockPar Value,	7,649,60
rta 6781 Alexandria, Bayou, Ma-	
con & Greenville R. R., Capital Stock Par Value,	
Capital StockPar Value,	206,600,00
Arkansas Northern R. R., Cap-	
ital Stock	5,500.00
Arkansas Coal & Mining Co., Capital Stock	
Capital Stock	11,250.00
Western Construction Co., Capital Stock	= 000 00
New Orleans, Mobile & Chicago	5,000.00
R R Co. Capital Stock Par Value	9 601 870 51
Quanah, Acme & Pacific R. R.	-,001,010.01
Quanah, Acme & Pacific R. R. Co., Capital Stock	60.000.00
Crescent Hotel Co., Capital Stock	30,000,00
Stock	15,198.00
Hotel Realty (Hotel Jefferson,	
Hotel Realty (Hotel Jefferson, St. L.) Capital Stock	5,000.00
Jasper Land Company, Capital	
Store Publishing Co. (P.	8,666.67
Stock Par Value, Star Publishing Co. (Ft. Worth), Capital Stock Par Value,	000.00
Kirby Lumber Co Capital	200,00
Kirby Lumber Co., Capital Stock	65,000,00
prownsvine, St. & Interpretar	
R. R., Capital StockPar Value,	10,000.00
Intermittent Vacuum Pre-cool.	
ing Co., Capital Stock Par Value,	60,000,00
St. L. & S. F. R. R. Co. Gen. Lien Mtg. 5% Bonds	
St. L. & S. F. D. D. C. D. Par Value,	216.03
St. L. & S. F. R. R. Co. Refunding Mtg. 4% BondsPar Value,	
St. L. & S. F. R. R. Co., N. O.	0,000,00
T. & M. Division, 1st Mtg	
5% Bonds Par Value	954 920 01
St. L. M. & S. E. R. D. Let	
Mortgage 4% Ronds Dan Val-	125.00
West Tulsa Belt R. R. 1st Mtg.	
West Tulsa Belt R. R. 1st Mtg. 5% Bonds Par Value, Cape Girardeau & Nor. R. R.	30,500,00
1st Mtg. 5% Bonds	16,000,00
St. Louis Club 2d Mtg. 5% Bonds	22 0000 000
	5,000,00
for C. & E. I. R. R. Com-	
	20,000,00
Winchell Townsite Co., Capital Stock Par Value, Frisco Construction Co. Cap.	204(000), (40)
Frisco Country of Constant of	2,000,00
ital Stock	
Frisco Construction Co., Capital Stock Par Value, Memphis Railroad Terminal	
Co. Capital Stock D. V.	10.000
New Orleans Terminal Co. Par Value,	10,000,00
New Orleans Terminal Co., Capital Stock	1 000 000 00
- Table,	,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,

6,152,793,92

Statement marked "J" gives of securities transferred to Receivers, which are either worthless, or are muniments of title, or belong to other companies, as indicated.

Cash and Securities in Sinking Funds with

Cash and Securities in Sinking Funds with		
United States Trust Co., Trustee, Trust Mtg. of 1880	<b>\$107,611.22</b>	
Ry. & Br. Co., 1st Mortgage	397,748.72	
-		505,359.94
[fol. 679] Miscellaneous Railroad Property, as fo	ollows:	
Rio Grande Ry. and Equipment, 22.5 miles of cost of Capital Stock)	(exclusive	115,478.06
Miscellaneous Physical Investments:		
Oklahoma City (Okla.) Terminal Property, in name of W. F. Evans, TrusteeCost, West Baton Rouge (La.) Terminal Prop-	\$214.753.10	
erty (Anchorage Plantation), in name of W. F. Evans, Trustee—Undivided half interest on approximately 564 acres, Cost, Memphis Union Depot Property—Undi- vided one-tenth interest on property pur-	34,343.23	
chased at Memphis, Tenn., for Union Depot	121,000.00	
name of W. F. Evans, TrusteeCost.	12,772,86	
Tower Grove (St. Louis, Mo.) Property— in name of W. F. Evans, TrusteeCost, Taylor City Belt (St. Louis, Mo.) Property	29,339,83	
—in name of W. F. Evans, Trustee. Cost, Muskogee (Okla.) Real Estate—in name	1.139.93	
of W. F. Evans, Trustee	11,543.50	
W. F. Evans, TrusteeCost, Hulbert (Ark.) Real Estate—in name of	$75,\!090,\!52$	
W. F. Evans, Trustee	322,00	
F. Evans, Trustee	1.372.40	
of W. F. Evans, TrusteeCost, Payments on Arizona Lands Option—in	4,005,65	
name of A. S. Greig, Trustee	32,139,41	
Value of Pail and Material Land		564,822.43
Value of Rail and Material leased to—		
Gideon & Anderson	\$12,965,20	
Boynton Land & Lumber Co	8,446.70	
Darling (L. E. Kelch)	1,475,00	
Edward Hely	2.345.79	
Chicago Mill & Lbr. Co	106,00	
Ohio Hardwood Lbr. Co	416.78	
Geo. McBride	1.937.50	
M. E. Leming	6,709.45	
Pascola Stave Co	3,520,00	
Pascola Lumber Co	338,50	
Three State Lumber Co	609.25	

Three State Lumber Co.....

Brown Stave Co.....

Topeka Land & Timber Co.....

Missouri Lumber & Mining Co.....

1,889.98

1,297.82

56,788.64

609.25

Baker Lumber Co	18,034.49	
Cache Valley Railroad	7,023.10	
Chapman & Dewey Lumber Co	963.30	
[fol. 680] Central Coal & Coke Co	1,314.54	
Wilson & Beall.	3,849,62	
Weir Coal Company		
Springfield Lumber & Cooperage Co		
Ash Grove White Lime Association		
Bokhoma & Northern Ry		
Frisco Lumber Co		
Pine Tree Lumber Co		
Portland Cement Co	2,750,79	
Michard Mfg. Co	10.26	
Pine Belt Lumber Co	30,191.10	
Manchester Lumber Co	774.79	
O. K. & M. Interurban Ry	11.042.92	
Kyle & Jacquith	334.15	
Choctaw Lumber Co	75,054.58	
Bates & Gillespie	5.015.57	
R. R. Hammond	160.21	
Puxico Mining Co	206.03	
Texas, Okla. & Eastern R. R. Co		
Portland Cement Co. (Cape Girardeau)	45,449.16	
Fisher Lumber Co	163.53	
Gideon & North Island R. R. Co	2.236.46	
DeSoto Gravel Co	4,953.10	
Holley Matthews Mfg. Co.	1.579.74	
Parmer & Hiras	743.72	
Barney & Hines	18,682.86	
Garvin & Northwestern Ry	2.089.37	
J. A. Cotner.	830.50	
Universal Sand Co	421.35	
Mills-Shoals Cooperage Co	36.79	
The state of the s		358,775.70
Bills Receivable:		
Crescent Hotel Commune		
Crescent Hotel Company	\$759.90	
Crescent Hotel Company.	3.799.50	
St. Louis, Kennett & Southeastern R. R. Co.	5,000.00	
St. Louis, Kennett & Southeastern R. R. Co.	5,000.00	
St. Louis, Kennett & Southeastern R. R. Co.	7.150.00	
Cassville & Western Ry. Co	4 000 00	
St. Louis, San Francisco & Toyac De C	1,142,318.69	
rescent Hotel Co	1,329,83	
t. G. Jones	500,00	
that aw Lamber & Londor Co	2.419.50	
Garrin & Northwestern Ry Co		
n. I. Ommley and I C Poul	1.506.00	
nausas Southwestern Ry Co	105.34	
	65,000,00	
Crawford County Mining Co	233.38	
Kansas City & Memphis Ry. Co	10,916,82	
Kansas City & Memphis Ry. Co	2,500,00	
Wm. F. Sprague and Jno. Closner	2,500,00	
Intermittent Vacanas Description	119,057.54	
Intermittent Vacuum Pre-cooling Co	17,000,00	
Crawford County Mining Co	1.242.63	
Sources South Western Ry Co	5,000,00	
16. 17. DIMBH	165.00	
	1.500.00	
	1,000.00	
	133.13	
	100.4	
Shortinger Di c se .		
Music Co	510.00	
Shattinger Piano & Music Co		

Olivania Prima Pri		
Shattinger Piano & Music Co	50.00	
Shattinger Piano & Music Co.	50,00	
Shattinger Piano & Music Co	50.00	
Shattinger Piano & Music Co. Shattinger Piano & Music Co.	50,00	
Shattinger Piano & Music Co	50.00	
Shattinger Piano & Music Co	-	
Shattinger Piano & Music Co.	50.00	
Shattinger Piano & Music Co	50.00	
Shattinger Piano & Music Co	50.00	
Shattinger Piano & Music Co	50.00	
Intermittent Vacuum Pre-cooling Co	50.00	
New Mexico and Arizona Land Co	1,350.00 $28,563.79$	
C. & E. I. R. R. Co	100,000.00	
	100,000.00	1,528,761.07
Traffic Balances:		1.020,101.0
Ticket	\$45,827.10	
Freight	1,356,424.02	
Car Service	20,455,66	
	20,355,00	1,422,706,78
Due from Agents and Conduct		1,744,100.78
Due from Agents and Conductors Due from U. S. Post Office Department	********	936,534.93
Due from Companies and Individuals	*********	73.822.87
Tom Companies and Individuals	********	2,954,457.29
State and County Scrip:		
Oklahoma	\$658.54	
Missouri	2,367.53	
Arkansas	712.40	
	114.10	3,738.47
Cash Advances:		34100.11
To Frisco Construction Co		
To Frisco Refrigerator Line	\$762,606.72	
To New Orleans, Texas & Mexico R. R. Co.	45,521.76	
To St. Louis, San Francisco & Texas Ry. Co.	657,304.41	
	15,621.15	
To A. T. Perkins, Trustee:		
Heyser Austwell Extension, Victoria Ex-		
tension	110,297.53	
San Benito & Rio Grande Valley Ry.,		
Brownsville, St. & Interurban Ry	924,814.73	
-		2,516,166,30
Cash Advances Account Working Funds:		
Southern Weighing & Inspection Bureau	\$70.50	
Southern Weighing & Inspection Burean (K		
C. M. & B.)	141.00	
Western Trunk Line Committee	152.29	
Western Trunk Line Committee (K. C. F. S.		
& M.)	266.57	
[101. 082] Western Ry, Weighing & Inspection		
Bureau Western Ry. Weighing & Inspection Bureau	1,222.50	
(K. C. F. S. & M.)	45.00	
So. West Miss. Valley Frt. Rate Com. (K. C.	15.00	
M. & B.)	E0.00	
Southern Iron Committee.	50.00	
Memphis Cotton Committee	35.00	
	40.95	

St. Louis Ass'n of Gen. Pass. & Ticket Agents	23.81	
Gen. Mgrs. Ass'n of the Southwest	25.00	
Southern Classification Committee	67.50	
Joint Validating Agency	70.08	
Western Classification Committee	487.05	
Ark. Car Service Association	54.62	
Railroad Committee	14.13	
Trans-Continental Freight Bureau	20.00	
Amer. Ass'n of R. R. Superintendents	49.59	
Western Passenger Association	149.44	
Transit Inspection Bureau	50.00	
Trans-Continental Passenger Association	25.00	
8. L. Oliver, Memphis, Tenn	14.733.29	
C. J. Snook, Birmingham, Ala	5,622,61	
J. R. Buchanan, Amory, Miss	1.205.87	
C. K. Clayton, Pratt City, Ala	204.68	
J. R. Dritt, Springfield, Mo	599.57	
J. Z. Roraback, Kansas City, Mo	3.194.20	
F. T. Coffin. Hugo, Okla	1.034.51	
D. W. Ramsey, Glen Allen, Alm	200.00	
T. D. Heed	4.931.16	
L. M. Harris	265.00	
H. D. Teed	1,409.28	
I. T. Cook	29,715.00	
Frank Anderson	200.00	
F. G. Jonah	500.00	
Claims Attorney	6,948.70	
E. C. Northrup	86.60	
Wichita Union Stock Yds. & Pkg House	00.00	
Trk. Ass'n	2,000.00	
Birmingham Terminal Co	700.00	
	***************************************	76,580,50
Insurance paid in advance		
Insurance paid in advance Frisco Building, Water, paid in advance		50,612.71
banding, water, pard in advance	*******	357.42
Rentals paid in advance:		
To A. T. & S. F. Ry., Facilities	\$5.65	
10 Missouri Pacific Rv. Tracks Springfield	121.75	
To J. B. Webb and S. H. Violet, Land, Okla.		
To Hobart Mill & Elevator Co., Land Kan.	34.41	
838	13.77	
To E. Hart, Land, Joneshoro	. 86	
10 Illinois Southern Ry Depot Sto	. ( )	
CICHEALE, ISA	.68	
10 Wabash R. R. Tracks St Louis	406.80	
10 S. Thomas, Land, Oklahoma	29.70	
10 A. I. & S. F. Rv., Tracks Dittelmer	35.87	
Missouri Pacific Ry Tracks Davids	51.96	
10 F. L. Billingsby, Land Carnthorsville	104.29	
To Editiv Revser Land St Lovice	294.71	
40 tree, W. Riggs, Land St Louis	294.71	
and St Land	224.43	
To Dillon & Randolph, Land, St. Louis	251.39	
	1 567	1 970 00
		1.870,98

[fol. 683] The following Securities and Property pledged for short-time loans, and which will revert to Receivers when loans are paid off:

1	ACRE .
St. L. & S. F. R. R. Co., Gen. Lien Mtg	
5% Bonds	
sion 1st Mtg. 5% Bonds	
E. I. Ry. Common Stock	
F. S. & M. Ry. Prfd. Stock	
Bonds Par Value, Kirby Lumber Co., Capital Stock Par Value, N. O. T. & M. R. R. Co., Capital Stock Par Value, Promissory Notes of N. O. T. & M. R. R. Par Value, S. B. & R. G. V. Int. Ry., Capital Stock Par Value	2,000,000,00
Promissory Note of S. B. & R. G. V. I. Ry	475,000,00

### Promissory Notes for Dallas Terminal Property, as follows:

Adam H. Davidson	81.406.25
Adam H. Davidson	1.406.25
Adam H. Davidson	1.406.25
Adam H. Davidson	1.406.25
Adam H. Davidson	5.625.00
Paul S. Miller	1.406.25
Paul S. Miller	1,406.25
Paul S. Miller	1,406.25
Paul S. Miller	1,406.25
Paul S. Miller	5,625,00
Henry Dorsey	1.640.65
Henry Dorsey	1.640.65
Henry Dorsey	1.640 .65
Henry Dorsey	1.640.65
Henry Dorsey	6.562.50
John E. Poindexter	1.254.17
John E. Poindexter	1.254.17
John E. Poindexter	
John E. Poindexter	1,254.17 1,254.17
John E. Poindexter	
R. L. Spann.	5,016.65
R. L. Spann	2,053,10
R. L. Spann	2,050.00
R. L. Spann.	2.050.00
R. L. Spann	2.050.00
Hale Davis	8,203.15
Hale Davis	1,406.25
Hale Davis	1,406.25
Hale Davis	1,406.25
[fol. 684] Hale Davis	1,406.25
E. W. Morton, Jr.	5,625,00
E. W. Morton, Jr.	2,343.75
E. W. Morton Jr	2,343.75
	2.343.75
	2,343.75
	9,375.00
	2,343,75
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	9,375.00
J. J. and A. J. Kline	2.051.00

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Morton Investment Co	17
Morton Investment Co	25
Morton Investment Co	17
Morton Investment Co	17
Morton Investment Co	17
Morton Investment Co	57
Morton Investment Co 8,906.	
3,000,2	- \$179.251.74
Property in Dallas, Tex., in name of W. F. Evans, Tru tee	of 17 007 41
Property in Dallas, Tex., in name of Red River, Texas	11,021.41
& So. Ry	1 155 004 50
New Iberia & Northern R. R., 102.15 miles and equipment, including Capital Stock and Bonds issued and	)-
be issued	. 1,594.299.09
New Iberia & Northern R. R. Syndicate, Participatio	11
Purchase	. 140.142.38
Iberia, St. Mary & Eastern Ry., approx. 54 miles an Equipment, including Capital Stock and Bonds issue	d d
or to be issued	ene =en = 4
Iberia, St. Mary & Eastern R. R. Syndicate Participal	
tion Purchase	. 102,555.86
	30,432,535.90

List of Securities Transferred to Reveivers Which are Either Worthless or are Muniments of Title or Belong to Other Companies, as Indicated

The following Stock Certificate

	\$100,000.00 Property of Cape Gir. Nor. R. R. Co. 35,000.00 Worthless. 3,000.00 Property of St. L. S. F. & T. Ry. Co. 24,500.00 Property of N. O. T. & M. R. R. Co. 29,700.00 Worthless.			*					
	St. L. 8			Title.	Title.	Title. Title.	little.	Pitte.	Pitte.
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	Property of Worthless. Property of Property of Worthless.	o, 40,00 Worthless, 9,500,00 Worthless,	Worthless. Worthless.	Muniment of Title.	Munimen	Muniment of Title. Muniment of Title. Muniment of Title.	Muniment of Tytle,	Muniment of Title.	Muniment
Union Trust Co	\$100,000.00 35,000.00 3,000.00 24,500.00 29,700.00 1,000.00	299,500,00	7,625.00 134,425.00 20,000.00	20,000.00	19,450.00 Muniment of Title.	1,989,100.00 299,500.00 89,500.00	2,750,000,00	10,149,000,00	1,605,500,60 Muniment of Tytle,
on file with the St. Louis	1,000 shares, par value, 3,500 shares, par value, 30 shares, par value, 245 shares, par value, 297 shares, par value, 20 shares, par value,	120 shares, par value, 2,905 shares, par value,	76} shares, par value, 5.377 shares, par value, 200 shares, par value.	200 shares, par value.	380 shares, par value.	19,901 shares, par value, 2,965 shares, par value, 995 shares, par value,	27,500 shares, par value,	101,490 shares, par value,	16,055 shares, par value,
Are following Stock Certificates, etc., were on file with the St. Louis Union Trust Co.:	Cape Girardeau & Northern R. R. Stock. Louisiana Purchase Exposition Stock. Union Terminal Co. (Dallas) Stock. Western Townsite Co. Stock. Taylor City Belt Ry. Co. Stock. St. Louis Light Artil. Co. (not now on books) St. Louis Musle Hall Assn. Stock (not now	Ozark Laud Company Stock (not now on books)  Logan Real Estate Co. Stock (not now on	Bureka Imp. Co. Stock (not now on books).  St. Louis & Nor. Ark. Ry. (Crf. of Deposit).  Kamens, Okla. & Gulf Ry. Co. (not on books).	Kansas, Okla, & Gulf Ry, Co., (not on books),	Kansas City. O. & S. Ry. Co. Stock (not	on books)  Ark. & Okla. Ry. Co. Stock (not on books) Okla. City Terminal Ry. Co. Stock. Kansas City. Ft. S. & M. Ry. Co. Stock (not	On books), contract for [fol. 686] K. C. F. S. & M. Ry. Co. Stock (not		Contract for

The following Stock Certificates are in the hands of F. H. Hamilton.

O Muniment of Title, O Muniment of Title, O Muniment of Title,	Muniment of Title. Muniment of Title Muniment of Title Worthless.			00 Worthless. 00 Muniment of Title. 00 Muniment of Title. 00 Muniment of Title. 00 Muniment of Title.
\$900.00 700.00 4,500.00	357,500.00 150,000.00 2,500.00 1,300.00	700.00 3,500.00 1,100.00	200.00 1.100.00 1.500.00 1.500.00 200.00	2000.00 1,200.00 700.00 200.00 200.00 200.00
9 shares stock, par value, 7 shares stock, par value, 45 shares stock, par value, 35 shares stock, par value,	3.575 shares stock, par value, 357,500,00 6.000 shares stock, par value, 150,000,00 25 shares stock, par value, 2,500,00 6.500 shares stock, par value, 1,300,00	7 shares stock, par value, 35 shares stock, par value, 7 shares stock, par value, 11 shares stock, par value,	9 shares stock, par value, 5 shares stock, par value, 11 shares stock, par value, 15 shares stock, par value, 9 shares stock, par value, 9 shares stock, par value,	12 shares stock, par value, 5 shares stock, par value, 7 shares stock, par value, 9 shares stock, par value, 8 shares stock, par value,
Ark Valley & Western R. R. Co. 9 shares stock, par value, 700 fayether R. Co. 7 shares stock, par value, 700 fayether R. Co. 45 shares stock, par value, 4,500 little Rock & Tex. Ry. Co. 35 shares stock, par value, 3,500 Memphis & New Orleans Ry. Co. (subscrip-	Muskogee City Br. Co. (not on books).  Pittsburg & Col. Ry. Co. Rallway Con. & Imp. Co. (not on books).  Red River, Tex. & Son. Ry. Co. (not on	books) Springfield Connecting Ry. Co. Fr. Smith & Van Buren Br. Co. Fr. Smith & Sou. Ry. Co.	Jopin Railway Co.  St. L. Wichita & West. Ry. Co.  St. Louis. Ark. & Tex. Ry. (consol.)  Springfield & Northern Ry. Co.  St. Louis & Okla. City Ry. Co.  Frisco, Okla. City & Tex. Ry. Co. (subscrip-	Sulphur Springs Ry. Co. Oklahoma City & Western Ry. Co. Ozark & Cherokee Central Ry. Co. St. Louis, Memphis & S. E. Ry. Co. St. Louis & Gulf Ry. Co.

73	30								
	1913, by Mr.	\$181,000.00	25,000.00	100,000.00	25,000.00	5,000.00	25,000.00	4,500.00	700.00
	st 30th,	Value 3,620 , New	Value	Value	res. Value	res. Value	Value	Value	Value
[fol. 687] Memorandum of Securities in St. Louis	The following is result of check of Securities in hands of Treasurer, August 30th, 1913, by Mr. Krabe, Mr. Jenny, myself and other members of Committee:	Kansas, Southwestern Ry. Co.  There is held by Treasurer a Certificate of Beneficial Interest for 3,620 shares of which the Frisco owns one-half, signed by Central Trust Co., New York.	Birmingham Terminal Co.  St. Louis Union Trust Co. holds Certificates for 249 shares.  F. H. Hamilton holds Certificates for 1 share.	Kansas City Terminal Ry. Co. F. H. Hamilton holds Certificates for 5 shares.	F. H. Hamilton holds Pioneer Trust Co.'s receipt for (in trust) 995 shares.  Wichita Union Terminal Ry. CoStock—Par Value F. H. Hamilton holds 2 shares.	Frisco Refrigerator Line All with the St. Louis Union Trust Co.	Rio Grande Ry. Co. Stock—Par Value St. Louis Union Trust Co. holds 243 shares.  F. H. Hamilton holds 7 shares	Paris & Great Northern R. R. Co. All with F. H. Hamilton, Treasurer.	St. Louis, San Francisco & Texas Ry. Co Stock-Par Value

5,500.00	1,200.00	200.00	6,535.10	149.60			206,600.00	5,500.00	11,250.00	5,000.00
Kansas City, Ft. Scott & Memphis Ry Stock—Par Value All with F. H. Hamilton, Treasurer.	Kansas City, Memphis & Birmingham R. RStock—Par Value	Kansas City & Memphis Ry. & Br. Co Stock—Par Value All with F. H. Hamilton, Treasurer.	St. Louis & San Francisco R. R. Co. St. Louis & San Francisco R. R. Co. St. Louis & San Francisco R. R. Co. 2d Prfd.—Par Value	St. Louis & San Francisco R. R. Co. St. L. U. T. Co. holds Certificates, etc., for all 1st Prfd. Stock.	St. L. U. T. Co. holds Certificates for \$54.20 Common Stock. F. H. Hamilton, Treasurer, holds Certificates for \$95.40 Common Stock.	There was also held by the St. L. U. T. Co. 17 Certificates of Common Stock in names of Directors, etc., aggregating 75 shares.	All with F. H. Hamilton, Treasurer.	Arkansas Northern R. R. Co	[10], 688] Arkansas Coal & Mining Co Stock—Par Value With St. Louis Union Trust Co	

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2,601,870.51	60,000.00	15,198.00 5,000.00	8,666.67	65,000.00	*10,000.00 60,000.00
New Orleans, Mobile & Chicago R. R. Co. Stock—Par Value Certificates of New York Trust Co. for \$2,384,750.00 With St. Louis Union Trust Co. (scrip) 41.00	Quanah, Acme & Pacific R. R. Co	Crescent Hotel Co. With St. Louis Union Trust Co. Hotel Realty Company (Hotel Jefferson)	Jasper Land Co.  With St. Louis Union Trust Co.  Star Publishing Co. (Ft. Worth)	5	With St. Louis Union Trust Co. *On books as \$5,000.00 (cost).  Intermittent Vacuum Pre-cooling Co. With St. Louis Union Trust Co., 5 shares. With F. H. Hamilton, Treasurer, 595 shares.

260,146.04	159.00 $125.00$	30,500.00	15,000.00	3,000.00	20,000.00	n Trust Co.:
St. Louis & San Francisco R. R. Co.  General Lien 5% Scrip (not on file) \$216.03  Refunding 4s with St. L. U. T. Co.  N. O. T. & M. Dvn. 5s with St. L. U. T. Co.  N. O. T. & M. (Scrip), not on file	Paı	West Tulsa Belt Ry.—1st Mtg. 5s	Cape Girardeau & Northern R. R.—1st Mtg. 5s	St. Louis Club—2d Mtg. 5s With St. Louis Union Trust Co. \$2,800.00 Sold and accounted for July 30, 1913	St. L. & S. F. R. R. Co., Crtfs. for C. & E. I. Common Stock	[fol. 689] The following Stock Certificates, etc., were on file with the St. Louis Union Trust Co.: Recorded on Books of Company as Munimonts of Title and the St. Louis Union Trust Co.:

Recorded on Books of Company as Muniments of Title and of no Value.

	733
\$100,000.00 35,000.00 3,000.00	9,000.00
1,000 shares, not Frisco property, Par Value, 3,500 shares, not Frisco property, Par Value, 30 shares, not Frisco property, Par Value, 245 shares	90 shares Par Value,
Stock tock ck	Mempuis Terminal Ky. Co. Stock

# Memorandum of Securities in St. Louis—Continued

29,700.00	1,000.00	3,000.00	299,500.00	7,625.00	134,425.00	20,000.00	20,000.00	19,450.00	1,999,100.00	299,500.00 99,500.00 2,000.00
297 shares, not Frisco property, Par Value,	20 shares, not Frisco property, Par Value,	120 shares, not Frisco property, Par Value,	2,995 shares, not Frisco property, Par Value,	761/4 shares, not Frisco property, Par Value,	5,377 shares, not Frisco property, Par Value,	200 shares, not Frisco property, Par Value,	200 shares, Common Par Value,	389 shares, Preferred Par Value,	19,991 shares Par Value, 1,999,100.00	2,995 shares 995 shares 200 shares Par Value, Par Value,
Taylor City Belt Ry. Co. Stock St. Louis Light Artillery Co. Stock	(not now on books) St. Louis Music Hall Ass'n Stock (not	now on books) Ozark Land Co. Stock (not now on	books) Logan Real Estate Co. Stock (not now	on books)  Eureka Imp. Co. Stock (not now on	books) St. Louis & North Ark. By. Co. (Cer-	tificates of Deposit) Kansas, Okla, & Gulf Rv. Co. Stock	(not now on books)  Kansas. Okla. & Gulf By. Co. Stock	(not now on books) Kansas City, O. & S. By, Co. Stock	(not now on books) Arkansas & Oklahoma Rv. Co. Stock	(not now on books) Oklahoma City Terminal Ry. Co. Stock Winchell Townsite Co. Stock

Kansas City, Ft. S. & M. R. R. Co. Stock (not on books) contract for Stock (not on books)  K. C. F. S. & M. R. R. Co. Stock (not on books)  Current River R. R. Co. Stock (not on books)  16,055 shares  16,055 shares  Far Value, 10,149,000.00  16,055 shares  Far Value, 1,605,500.00  16,055 shares  For Hamilton Treasurer. B.	\$900.00 \$900.00 700.00 5,000.00 357,500.00 1,000.00 1,500.00 1,300.00 2,500.00 1,700.00 3,500.00 1,100.00 900.00 500.00	
alue, 2 alue, 10 alue, 1	Value, Va	
Par Va Par Ve Par Ve	9 shares stock, Par Value, 7 shares stock, Par Value, 50 shares stock, Par Value, 55 shares stock, Par Value, 3,575 shares stock, Par Value, 3,575 shares stock, Par Value, 5,000 shares stock, Par Value, 15 shares stock, Par Value, 5,500 shares stock, Par Value, 6,500 shares stock, Par Value, 7 shares stock, Par Value, 9 shares stock, Par Value, 7 shares stock, Par Value, 9 shares stock, Par Value, 9 shares stock, Par Value,	
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27,500 shares 101,490 shares 16,055 shares are in the bands of F H	y as Muniments of Title and Co. (subscriptions to) on books) of on books) co. (not on books) Co. Co.	
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Ft. S. M. R. M. R. R. R. ract fo	ks of C d & Se d & Se d & Se L. R. L. R. Ferring dermin d	
City, (not o S. & oks) Oks) River Conti	ley & leh &	
Kansas City, Ft. S. & M. R. R. Co. Stock (not on books) contract for K. C. F. S. & M. R. R. Co. Stock (not on books)  Current River R. R. Co. Stock (not on books) contract for [fol. 690] The following Stock Certific	corded on Books of Company as Muniments of Title and of no Value.  Ark. Valley & Western R. Co.  Blackwell, Enid & Southwestern Ry.  Fayetteville & L. R. R. Co.  So shares American Co.  Little Rock & Tex. Ry. Co.  Memphis & New Orleans Ry. Co. (subscriptions to)  3,575 shares Memphis R. R. Terminal Co.  Muskogee City Br. Co. (not on books)  New Orleans Terminal Co.  Pittsburg & Col. Ry. Co.  Pittsburg & Col. Ry. Co.  Red River, Tex. & Sou. Ry. Co.  Ft. Smith & Van Buren Br. Co.  T shares Springfield Connecting Ry. Co.  T shares Springfield Connecting Ry. Co.  T shares Stringfield Railway Co.  S shares Str. L., Wichita & West Ry. Co.	
R M D F	S. P. F. F. S. B.	

# Memorandum of Securities in St. Louis—Continued

1,100.00 1,500.00 900.00 900.00	
11 shares stock, Par Value, 15 shares stock, Par Value, 9 shares stock, Par Value, 9 shares stock, Par Value,	12 shares stock, Par Value, 5 shares stock, Par Value, 7 shares stock, Par Value, 9 shares stock, Par Value, 8 shares stock, Par Value,
St. Louis, Ark. & Tex. Ry. (consol.) Springfield & Northern Ry. Co. Springfield & Southern Ry. Co. St. Louis & Oklahoma City Ry. Co. Frisco, Okla. City & Tex. Ry. Co. (subscriptions)	

I, W. P. Newton, hereby certify that the Securities listed above and on the two preceding sheets, numbered one (1) and two (2), were, on August 30th, last, checked by me, together with Mr. Krabe, Mr. Jenny and other members of the Committee, and found to be in possession of the Treasurer for the Receivers, or deposited by him in safe deposit box of the St. Louis Union Trust

St. Louis, Sept. 17th, 1913.

W. P. Newton.

Subscribed and sworn to before methis 17th day of September, 1913. Kate L. Worley, Notary Public. My commission expires November 20th, 1915.

[fol. 691] At this point, the defendant and the St. Louis-San Francisco Railway Company by counsel, admitted that neither the receivers, the reorganization managers, the defendant railroad company, nor the St. Louis-San Francisco Railway Company, ever scheduled the claims of these interveners, in the schedule of claims filed in the receivership case.

Thereupon the interveners rested their case in rebuttal.

This was all of the evidence offered and introduced upon the hearing of said interventions before the Special Master.

Approved June 14, 1924.

(Sgd.) Walter H. Sanborn, Senior Circuit Judge.

June -, 1924.

Approved 6-11-24. W. F. Evans, E. T. Miller, Attys. for Deft. & Ry. Co.

Endorsed: Filed, February 25, 1922. Jas. J. O'Connor, Clerk.

### IN UNITED STATES DISTRICT COURT

Order Further Extending Time to File Transcript— July 5, 1924

And afterwards, to-wit, on July 8th, 1924, the following further proceedings were had and appear on file and of record in said cause, to-wit:

Upon consideration of the stipulation filed herein this day by solicitors for the interveners, E. B. Spiller and E. B. Spiller, et al., and the solicitors for the St. Louis & San Francisco Railroad Company, and — San Francisco Railway Company, it is hereby Ordered that the interveners' time for filing their transcript of appeal herein be extended sixty (60) days from the 8th day of July, 1924.

(Signed) Kimbrough Stone, Judge.

[fol. 692] IN UNITED STATES DISTRICT COURT

### [Title omitted]

STIPULATION FOR OMISSION OF CERTAIN MATTERS FROM TRANSCRIPT—Filed August 26, 1924

## Consolidated under the Style

Consolidated Cause, Final, No. 4174

"In the Matter of the Interventions of E. B. SPILLER et al.

It is hereby stipulated and agreed by and between the above named interveners and the St. Loius & San Francisco Railroad Company and the St. Louis-San Francisco Railway Company, parties herein;

- 1. That the Clerk of this Court may omit from the transcript of the record and proceedings in this cause, to be filed in the United States Circuit Court of Appeals, Eighth Circuit, Exhibit A, attached to the Bill of Complaint, said Exhibit A being a memorandum concerning the funded and other fixed interest bearing debts, and that the Clerk may substitute in lieu thereof the language "Here follows Exhibit A, a memorandum concerning the funded and other fixed interest bearing debt."
- 2. That the Clerk of this Court may omit from the transcript of the record and proceedings in this cause, to be filed in the United States Circuit Court of Appeals, Eighth Circuit, that portion of an exhibit attached to the intervening petition of E. B. Spiller, et al., No. 402, Exhibit A beginning at the top of page 4 and ending at the bottom of page 51; that the same portion of an exhibit attached to the intervening petition of E. B. Spiller, No. 403, also designated Exhibit A, may be omitted; that the same pertion of said document, designated Exhibit A, may be [fol. 693] omitted whenever called for elsewhere in the record and proceedings in this cause; and that the Clerk may substitute in lieu thereof the language: "pages 4 to 51, both inclusive, of Exhibit A, which are here omitted, set forth the names of claimants and the amounts of their claims auginst carriers other than the St. Louis & San Francisco Railroad Company."

3. That the Clerk of this Court may omit from the transcript of the record and proceedings in this cause, to be filed in the United States Circuit Court of Appeals, Eighth Circuit, that part of Exhibit B, a deed, annexed to interveners' Exhibit 22, the order confirming the sale, beginning on page 6, line 25, and ending at the top of page 45, and that the Clerk may insert in lieu thereof the language: "Here follows description of said real estate."

(Signed) John S. Leahy, Walter H. Saunders, D. A. Murphy, S. H. Cowan, Attorneys for Interveners, W. F. Evans, E. T. Miller, Attorneys for St. Louis & San Francisco Railroad Company and St. Louis-

San Francisco Railway Company,

Clerk's Certificate to Transcript omitted in printing.

[fol. 694] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 6786

E. N. Spiller et al., Appellants,

VS.

St. Louis & San Francisco Railroad Company et al., Appellees

STIPULATION AS TO PRINTING RECORD—Filed February 20, 1925

It is hereby stipulated by and between counsel for appellants and appellees in the foregoing cause, that in printing the transcript in said cause in the United States Circuit Court of Appeals for the Eighth Circuit, the following changes shall be made in the typewritten transcript:

1. Omit from the transcript pages 241 to 260, both inclusive, containing the exceptions of the St. Louis-San Francisco Railway Company, to Report of Special Master, and substitute in lieu thereof the following:

- "The exceptions of the St. Louis-San Francisco Railway Company to said report of said special master are identical with the exceptions of the St. Louis & San Francisco Railroad Company, to said report except for the change in name, and except that in exceptions number 48, 49, 50, 51 and 52, the name St. Louis-San Francisco Railway Company is substituted for the word 'Exceptor'."
- Omit from the transcript, pages 316 to 320, both insive, the bond given by appellants and insert in lieu thereof the following:

[fol. 695] "The appellants gave an appeal bond in this case in due form of law, which was properly allowed and approved by the Court."

- 3. Omit from the transcript, pages 325 to 331, the various orders extending time for filing the transcript herein, and substitute in lieu thereof, the following:
- "By orders duly entered of record, the time for filing the transcript herein was extended from April 17, 1923 to May 9, 1924."
- 4. Omit Exhibit 5, the opinion of the Interstate Commerce Commission, reported in 11 I. C. C. 296, Transcript pages 339 to 408, both inclusive, and insert in lieu thereof, the following:
- "In order to avoid the expense of printing, the decision of the Interstate Commerce Commission, in the case of The Cattle Raisers' Association of Texas vs. The M. K. & T. Railway Company, et al., No. 732, 11 I. C. C., p. 296, reference is hereby made to said case, reported in said volume, and decided August 16, 1905."
- Omit pages 447 to 465, both inclusive, and print in lien thereof the following:
- "That said petition, Exhibit 7, is identical mutatis mutandis with Exhibit 6, supra, except as to amounts and names, and covers the same period of time."
- 6. Omit the tabulation as marked on pages 613 and 614 of the transcript, being part of the report of the Missouri Public Service Commission in the matter of the application of J. W. Seligman & Company et al., in the reorganization of

the St. Louis & San Francisco Railroad Company, and print in lieu thereof the following:

"Printed, supra, in full, in application to Missouri Public Service Commission."

7. Omit tabulations and statements as marked on pages 614 to 617, inclusive, of transcript, being part of said report of said Missouri Public Service Commission, beginning with the words "Prior Lien Mortgage Gold Bonds" on page 614, and ending with the figures "\$250,000,000" on page 617, and print in lieu thereof the following:

"Printed, supra, in full, in application to Missouri Public Service Commission."

[fol. 696] 8. Omit tabulations and statements as marked, Tr. pp. 617 to 620, both inclusive, beginning with the words "Prior Lien Mortgage Gold Bonds" on page 617, and ending with the figures \$53,000,000, top of page 620, and print in lieu thereof the following:

"Printed, supra, in full, in application to Missouri Public Service Commission."

9. Omit tabulations as marked, Tr. pages 620, 621, both inclusive, beginning with the words "Receiver's Certificate \$3,000,000." Tr. p. 620, and ending with the figures "\$25,000,000" on top of page 621, and print in lieu thereof the following:

"Printed, supra, in full, in application to Missouri Public Service Commission."

10. Omit tabulation as marked, Tr. page 621, beginning with words "Fixed Charge Obligations", and ending with the words "Total Stock", and print in lieu thereof the following:

"Printed, supra, in full in Reorganization Plan and Agreement, and in application to Missouri Public Service Commission."

11. Omit tabulation as marked, Tr. page 622, and print in lieu thereof the following:

"Printed, supra, in full, in application to Missouri Public Service Commission."

- 12. Omit tabulation as marked, Tr. page 623, and print in lieu thereof the following:
- "Printed, supra, in full, in application of Missouri Public Service Commission."
- 13. Omit tabulated description of properties, as marked, Tr. pages 760 to 765, both inclusive, and print in lieu thereof the following:
- "Here follows detailed description of property covered by the Refunding Mortgage."
- 14. Omit tabulated description of properties as marked, beginning on bottom of Tr. page 765, down to and including the figures \$140,000, on Tr. page 777, and print in lieu thereof the following:
- [fol. 697] "Here follows detailed description of property covered by The General Lien Mortgage."
- 15. Omit description of properties as marked, Tr. pages 840 to 856, both inclusive, and print in lieu thereof the following:
- "Here follows [detained] description of the properties, included in the Deed, incorporated in the decree confirming the sale, as Exhibit A."
- 16. Omit Tr. pages 867 to 877, both inclusive, as marked, and print in lieu thereof the following:
- "Here follows the signatures and acknowledgments in proper form of all parties to said Deed, Exhibit A."
- 17. Omit as marked, Tr. pages 889 to 895, both inclusive, and print in lieu thereof the following:
- "Here follows the signatures and acknowledgments, in proper form, of all parties to Exhibit B, incorporated in said decree, confirming the sale.
  - S. H. Cowan, D. H. Murphy, John S. Leahy, Walter H. Saunders, Attorneys for Appellants. W. F. Evans, E. T. Miller, Attorneys for Appellees.

Dated and Signed in Triplicate this 19th day of February, 1925.

[File endorsement omitted.]

[fol. 698] Appearances of Counse omitted in printing.

[fol. 699] Minute entry of argument and submission December 8, 1925, omitted in printing.

[fol. 700] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, MAY TERM, A. D. 1926

### No. 6786

E. B. SPILLER et al., Appellants

VS.

St. Louis & San Francisco Railroad Company et al., Appellees

Appeal from the District Court of the United States for the Eastern District of Missouri

Before Stone, Kenyon and Booth, Circuit Judges

Mr. David A. Murphy and Mr. Walter H. Saunders (Mr. S. H. Cowan and Mr. John S.-Leahy were with them on the brief), for appellants.

Mr. E. T. Miller (Mr. W. F. Evans was with him on the brief), for appellees.

### Opinion-Filed June 24, 1926

Kenyon, Circuit Judge, delivered the opinion of the Court:

The history of this controversy extends over a period of nearly twenty years. It is difficult to cover the facts in a brief narrative. However we endeavor so to do. The findings of the Master and the statement by the trial court have little in dispute as to the controlling facts.

In 1903 the St. Louis & San Francisco Railroad Company, appellee, (hereafter designated as the Railroad Company) [fol. 701] and other railroads not here involved advanced freight rates on cattle shipments from the state of Texas

and other western states to Kansas City, Chicago, St. Louis and other primary markets three cents per hundred weight. These rates were challenged by divers parties as unreasonable, unjust and unlawful, the special challenge being by the Cattle Raisers' Association of Texas.

The Interstate Commerce Commission (hereinafter called the Commission) on August 16, 1905, found the rates to the extent of the increase of three cents per hundred weight to be unjust and unreasonable. 11 I. C. C. Rep. 296.

Prior to the passage by the Congress of what is known as the Hepburn Act, June 29, 1906, there was no power in the Commission to prescribe rates, for transportation of property. After this act became effective a petition was

filed with the Commission to reopen the case.

April 14, 1908 (13 I. C. C. Rep. 418), the Commission reaffirmed its position of August 16, 1905, and again pronounced the rates excessive and unreasonable, and made an order prescribing rates for the future to take effect November 17, 1908, being the rates existing prior to 1903, viz., three cents less per hundred weight. Questions of reparation to be allowed only from August 29, 1906, were reserved by the Commission to be subsequently dealt with. This order was contested in the courts by the Railroad Companies.

Appellant Spiller (hereinafter with others designated as interveners) presented claims for reparation based on said excessive rates exacted from August 29, 1906, to November 17, 1908, which were heard from time to time, and on January 12, 1914, the Commission made an order in which it directed the defendant Railroad Company to pay to intervener Spiller, who was assignee of a large number of claims, the sum of \$27,682.75 plus interest to June 15, 1914, and also to pay to other shippers who had not assigned their claims to Spiller certain amounts as reparation for the excessive rates aggregating \$3,244.61.

May 27, 1913, on the bill of complaint of North American Company (a general creditor), filed in the United States District Court, Eastern District of Missouri, Receivers were appointed for the Railroad Company, who took over the [fol. 702] general control, management and operation of its properties. A like bill was filed by another creditor on April 3, 1914. After the appointment of the Receivers, and

within the time prescribed by the Act to Regulate Commerce, the orders of reparation made by the Commission in favor of interveners were served upon the Railroad Company and its Receivers. They refused to pay the moneys which the Commission had ordered paid. May 22, 1914, the trustees under the general lien mortgage of the Railroad Company dated August 27, 1907, filed bill for foreclosure. July 9, 1914, the trustees of the Railroad Company's refunding mortgage dated June 20, 1901, filed a bill for fore-The same Receivers theretofore appointed were appointed in these proceedings and the entire matter was consolidated in a single suit entitled "North American Company, Complainant, vs. St. Louis & San Francisco Railroad Company, Defendant, No. 4174, Consolidated Cause Final." The final decree was rendered in the consolidated cause and each of its constituent causes.

On December 29, 1914, intervener Spiller filed suit under the provisions of Section 16 of the Interstate Commerce Act in the District Court of the United States for the Western Division of the Western District of Missouri at Kansas City against the various railroads to enforce payment of the amount and interest that the Commission had ordered paid. The other interveners also filed suit. Attorneys employed by the Receivers appeared in these cases and contested the same. Suits were also filed at For Worth and St. Louis by the same parties against the carriers, on the same cause of action, but were subsequently dismissed. Other railroad companies were joined as defendants in the suits at Kansas City, but they are not interested parties here. These cases proceeded to trial, and on August 16, 1916, intervener Spiller recovered judgment in the sum of \$30,212.31 with interest thereon from August 1, 1916, and also judgment for \$3,021.23 as attorney fees to be taxed as costs. The other appellants in this suit (sometimes bereafter designated as other interveners) recovered judgment for \$3,658.55 with interest likewise, and \$364.63 attorney fees to be taxed as costs. Appeal was taken to this court on August 28, 1916, by the attorneys employed by the Receivers of the Railroad Company. The attorneys for the Bailway Company were also engaged in the case after November 1, 1916. It was agreed by stipulation that the appeal, while taken only in [fol. 703] the case of E. B. Spiller vs. Missouri, Kansas &

Texas Railway Company et al., should be controlling in the case of E. B. Spiller et al. vs. the same defendants. In the meantime an interlocutory decree had been entered in the receivership suit May 29, 1914, requiring that all claims against the Railroad Company be filed by October 1, 1914 These orders were extended and the final time for filing claims expired February 1, 1916. March 31, 1916 the final decree of foreclosure providing for sale of the Railroad Company's property was entered, and on July 16, 1916 the property was sold either to or for the St. Louis & San Francisco Railway Company (hereinafter called the Railway Company). This sale was confirmed on August 29, 1916. which was thirteen days after the judgments were rendered in the District Court at Kansas City before referred to, and the day after the Railroad Company had appealed from the same to this court. The Railway Company took charge of the properties about November 1, 1916. Prior to August 29, 1916, the date of the confirmation of the sale, interveners had no notice or knowledge of any order made by the court fixing the time within which claims could be filed in the cause. Notice of said order was made by publication. but no publication was made in Texas or Oklahoma where all but a few of the claimants lived.

On August 29, 1916, attorneys for interveners gave notice in open court that they had claims against the defendant Railroad Company for illegal freight exactions; that the claims had been reducted to judgment in the District Court of the United States for the Western Division of the Western District of Missouri; that an appeal was being taken from said judgment by the Railroad Company and other carriers, and that the contention of the interveners was that their claims were prior in right and superior in equity to the claims of all other creditors, including bondholders. A written notice to the same effect was also served at the same time upon Henry W. Taft, attorney for the reorganization committee, and the Railway Company; also upon the attorney for the Receivers and the attorney for the Railroad Company.

Under the plan of reorganization securities of the new company were to be exchanged for securities of the old. The original plan was not approved by the Public Service [fol. 704] Commission of Missouri, or at least it required

modification thereof, and under the accepted plan of reorganization the stockholders of the old company were to receive and did receive more than \$45,000,000.00 of the stock of the new company as representing their equity in the property without the payment of anything therefor. There is some claim in argument that this is not correct, but the record we are satisfied sustains it as a fact. amount of cash was turned over to the Receivers by the Railroad Company (approximately \$300,000.00) much in excess of the claims of interveners, and a large amount of cash was also turned over by the Receivers to the reorganized Railway Company largely in excess of the claims of interveners.

October 29, 1917, this court reversed the judgment of the District Court of the United States for the Western Division of the Western District of Missouri and remanded the case for a new trial, its mandate being filed March 27, 1918, the judgment having been modified to some extent on March 11, 1918. Interveners then took the case to the Supreme Court of the United States by certiorari.

On May 17, 1920, the Supreme Court of the United States reversed the judgment of this court and affirmed the judgment of the District Court for the Western Division of the Western District of Missouri, the mandate of the Supreme Court being filed in that court June 6, 1920. Applications were filed in that court for additional attorney fees, which were allowed.

December 2, 1920, interveners applied to the District Court of the Eastern Division of the Eastern District of Missouri for leave to file in the consolidated receivership cases intervening petitions setting forth their claims against the Railroad Company for illegal exactions of freight rates for which they had secured judgment in the United States District Court for the Western District of Missouri on August 16, 1916.

On February 12, 1921, the court granted the applications, and on March 10, 1921, granted applications to file supplemental intervening petitions. The matter was referred to a Master, who heard the same and made extended findings of fact and conclusions of law, his recommendations being that judgment be entered in favor of intervening petitioner, E. B. Spiller, in the sum of \$30,212.31 with interest at six

[fol. 705] per cent per annum from August 1, 1916, being the amount awarded by the judgment of the United States District Court at Kansas City, and that judgment also be entered in favor of intervener, E. B. Spiller, in the sum of \$1,235.13, balance unpaid of attorney fees, and that the entire amount of \$31,447.44 be adjudged as prior in lien and superior in equity to the refunding mortgage and the general lien mortgage of the Railroad Company, and that it should be enforced against the property conveyed to the Railway Company and also recommended that similar judgment be entered in favor of the other interveners, E. B. Spiller et al., in the sum of \$3,652.97 with interest likewise at six per cent from August 1, 1916, and also \$365.29 as

attorney fees.

The trial court did not sustain the conclusions of law of the Master, and held that interveners were barred by laches from presenting their claims, and were especially barred because they did not file them in accordance with the terms of the interlocutory orders and the final decree, and held also that, were they not barred by laches and estopped by the failure to file their claims, they could not recover as preferential claimants under the doctrine that the Railroad Company had become a trustee ex maleficio for their benefit, because such remedy was inconsistent with and abrogated by the Act to Regulate Commerce and the exclusive remedies therein prescribed; further that they were estopped from maintaining an action on the theory that a trust ex maleficio had been created, as they had resorted to an inconsistent remedy, i. e., reparation under the Act to Regulate Commerce. The court also found that interveners were not entitled to preference on the current expense and wage theory commonly known as the six months' rule. The conclusion of the learned trial court is concisely stated at the close of the opinion in North American Co. v. St. Louis & S. F. R. Co., 288 Fed. 612, 633, as follows: "For the reasons which have now been stated the court finds itself unable to resist the conclusion that, if the prosecution of the proceedings commenced by the intervening petitions herein had not been barred by laches, the claims of the interveners to liens upon or interests in the property or the proceeds of the property of the mortgagor company prior in lien or right or superior in equity to the prior recorded

liens of the mortgages foreclosed could not be sustained."
The intervening and supplemental intervening petitions were dismissed.

[fol. 706] This is a brief resume of transactions covering a long period of time during which interveners have tried to collect moneys which they claim were wrongfully taken from them by excessive, unjust and unreasonable freight rates. Other facts will be referred to subsequently.

Appellees suggest that the assignments of error are too general to direct the court's attention to the questions involved. We are satisfied the controlling questions are sufficiently before us in the assignments of error, and consider the case from that viewpoint.

Were interveners estopped by laches from asserting their alleged rights? The trial court was of the opinion they were, and on this subject said: "if such a suit or application is brought after the time fixed by the analogous statute of limitations at law, the burden is upon the complainant or petitioner to plead and prove unusual conditions or extraordinary circumstances, which make it inequitable to apply the settled rule and stay the proceedings, notwithstanding the fact that the analogous limitation expired before this suit or application was brought. This case falls in the latter class. The times of the statutory limitations of the analogous actions at law had all expired long before the petitioners presented their applications for intervention, and their petitions ought to be dismissed under the settled rule, unless by pleading and proof they have established preponderant equitable reasons why they should be exempted from its operation." North American Co. v. St. Louis & S. F. R. Co., 288 Fed. 612, 621-622.

Laches is an equitable doctrine not controlled by or dependent upon statutes of limitation, although courts quite generally consider the time fixed by such statutes in actions at law of like character as having some bearing on the pertinency of the doctrine of laches, or perhaps more accurately stated, on the burden of proof with respect thereto.

The applicability of the doctrine of laches is dependent upon the circumstances of each particular case. Galliher v. Cadwell, 145 U. S. 368; Abraham v. Ordway, 158 U. S. 416; Jackson v. Jackson et al., 175 Fed. 710; Buchler v. Black et al., 226 Fed. 703; Taylor v. Salt Creek Consol. Oil Co. et al., 285 Fed. 532.

[fol. 707] Mere lapse of time does not constitute laches. In addition it must appear that something has occurred that would make it inequitable to grant the relief prayed for Schwartz v. Loftus et al., 216 Fed. 320; Minnesota Mut. Inv. Co. v. McGirr et al., 263 Fed. 847, 855; Meyer et al. v. Ritter, 268 Fed. 937; Northern Pacific Ry. Co. v. Boyd, 228 U. 8. 482; Southern Pac. Co. v. Bogert, 250 U. S. 483.

Laches cannot exist as to a party unless he has legal knowledge of the facts affecting his rights. Galliher v.

Cadwell, 145 U.S. 368.

The doctrine of laches is to assist and not to defeat justice—it is to be determined by considerations of justice. Ide v. Trorlicht, Duncker & Renard Carpet Co., 115 Fed. 137, 148; Drees v. Waldron, 212 Fed. 93; Mathieson v. Craven, 247 Fed. 223, 226; Townsend v. Vanderwerker, 160 U. S. 171, 186.

It is sound doctrine that if a party interposing defenses of laches has been responsible for and substantially contributes to the delay he is precluded from taking advantage thereof. 5 Pomeroy's Eq. Jurisprudence, Sec. 35; Northern Pac. Ry. Co. et al. v. Boyd, 177 Fed. 804; Taylor v. Salt Creek Consol. Oil Co. et al., 285 Fed. 532. In Northern Pac. Ry. Co. et al. v. Boyd, supra, the court said: "It is impossible to escape the conviction that the delay was not prejudicial to the appellant but was to its advantage, and that it was largely caused by its own acts. \* \* \* Where the party interposing a defense of laches has contributed to or caused the delay, he cannot take advantage of it."

Measured by these principles does the history of this litigation justify barring consideration of interveners' claims

on the general ground of laches?

In 1904 the rates that had been established by the carriers, including the Railroad Company, for shipments of cattle from Texas, were challenged before the Interstate Commerce Commission. In 1905 the Commission found the challenge was warranted and that the rates were excessive to the extent of three cents per hundred weight. The Commission was impotent to afford relief until the passage of the Hepburn Act in 1906. After that interveners again brought this matter before the Commission in 1906 and [fol. 708] 1908, when the decisions of 1905 as to these rates was reaffirmed. Reparation was ordered in 1914 and de-

mand made on the Railroad Company for payment thereof. Certainly up to that time interveners were guilty of no laches; neither were they in waiting after the award the six months' time the Commission had given the Railroads within which to pay the same before taking further action. They might have expected the reparation allowed would be paid, but it was not. They then proceeded as provided in Section 16 of the Commerce Act (Section 8584 Comp. Stat. 1916) and promptly brought suits in the United States Districi Court at Kansas City to enforce the orders of the Commission. The record shows no unnecessary delay on their part during the progress of said suits. Judgments were rendered therein August 16, 1916. The affairs of the Railroad Company were then in the hands of Receivers. final decree in the receivership case had been entered before interveners' judgments were secured. The judgments were not paid, but the case was appealed August 28, 1916. Surely interveners were not then delaying the adjustment of matters. While the judgment was in process of appeal the final sale of the Railroad Company's properties was made and confirmed. Interveners had no actual notice of the interlocutory orders or of the final decree. Their counsel knew that the receivership matters were pending and, of course, could have known of the orders by a search of the records. Interveners on August 29, 1916, in open court, prior to the confirmation of the sale, notified all parties concerned who were there represented, of their claims. also served written notice on the same date on Henry W. Taft, attorney for the reorganization committee and the Railway Company; also on the Railroad Company and the Receivers, of their claims and that they were of superior equity. Said notice concluded as follows: "Therefore, these plaintiffs, as shown in said judgments, claim that the purchaser of said property takes it subject to all the rights of said plaintiffs, and that their said rights for full payment thereof is a lawful charge against the said St. Louis & San Francisco Railway Company aforesaid purchaser of the property and assets of the said St. Louis & San Francisco Railroad Company, if the sale be confirmed. said plaintiffs the sale of said property to the St. Louis & San Francisco Railway Company is fraudulent and void, and said plaintiffs, in whose behalf said judgments have been rendered, are entitled to have the property so sold and assets acquired or to be acquired by the purchaser, either [fol. 709] the purchasing committee or the St. Louis & San Francisco Railway Company, if it shall be the purchaser, applied to the payment of said plaintiffs' debt by virtue of their rights as judgment creditors."

In the Circuit Court of Appeals the judgment of the District Court was reversed and the claims of interveners were apparently wiped out by the holding of this court. Interveners then took the matter to the Supreme Court of the United States by writ of certiorari, and in May, 1920, the Supreme Court reversed this court and affirmed the judgment of the District Court of the United States entered at Kansas City. The mandate of the Supreme Court was filed July 2, 1920. Interveners then filed petitions for attorney fees in the District Court at Kansas City, which were allowed. Through all these years the attorneys for the Railroad Company, the Receivers and the Railway Company fought these demands of interveners. The Railway Company through its attorneys conducted the contest in the Supreme Court of the United States. It would seem that the interveners were about as persistently and consistently diligent as litigants could be. Certainly in this general situation there is little to sustain the charge of laches by reason of delay.

In addition to delay it is urged that they were guilty of laches in failing to file their demands pursuant to the interlocutory orders entered in the receivership and the final decree, and therefor- are now estopped to assert their claims. It is conceded in the record that interveners had no actual notice or knowledge of the interlocutory decrees, or of the final decree until August 29, 1916. The trial court held they had constructive notice. It is the usual and established practice of the courts to require publication of such orders with respect to the time to present claims in receivership matters. It appears in this record that while nearly all of the interveners and their assignors lived in Texas and Oklahoma the notices were not published in any papers in those states. It is perfectly apparent that the attorneys of the Railroad Company and of the Receivers and all parties interested knew before the final decree in March, 1916, and confirmation of the sale in August, 1916, that interveners in their suits at Kansas City were seeking to recover the amounts allowed by the Commission and that "the ultimate purpose of the litigation was to obtain satisfaction of the appellee's [fol. 710] claim out of the property of the Railroad Company or of the Railway Company." Northern Pac. Ry. (o. v. Boyd, 177, Fed. 804, 824. The failure to file claims in the receivership case under the circumstances disclosed in this record was not inexcusable neglect. Courts have permitted the filing of claims after the time fixed in interlocutory orders where justified by equitable circumstances. In the Boyd case, supra, Boyd filed no claims in the receivership case, and it was held he was not guilty of inexcusable delay.

The trial court in its opinion referring to interveners and the notice in open court of August 29, 1916, said: "if they had then filed a dependent bill, or, as was done in the Boyd Case, an original bill (Northern Pacific Ry. v. Boyd, 228 U. S. 482, 492, 33 Sup. Ct. 554, 57 L. Ed. 931), or if they had then procured an insertion in the final decree of such an exemption of themselves and their claims from the estoppels thereof as the Guardian Trust Company secured in Central Improvement Co. v. Cambria Steel Co., 201 Fed. 811, 815, 120 C. C. A. 121, and Kansas City Southern Railway Co. v. Guardian Trust Co., 240 U. S. 166, 174, 36 Sup. Ct. 334, 60 L. Ed. 579, they might possibly have escaped those estoppels and the fatal consequences of their laches." North American Co. v. St. Louis & S. F. R. Co., 288 Fed. 612, 623-624.

While it might have been the better practice to have proceeded by an original bill, yet we think that in view of the litigation then pending, which the Railroad Company and the Receivers were appealing to this court, and the unusual circumstances existing with relation to this entire matter, interveners' rights ought not to be barred by laches because they did not file an original bill or attempt to have themselves exempted from the operation of the final decree. The notice given of their claims would not be sufficient to destroy an estoppel that had been established by laches, but it is an important element in view of all the circumstances in this case bearing on the question of whether or not that situation had arisen.

Through all these proceedings the Railroad Company, the Receivers and the Railway Company, who now insist that interveners should have filed their claims, were contending that interveners had no valid claims. They presented that idea so forcibly to this court that it decided interveners could not collect their demands. Were interveners compelled to abandon their efforts in the courts of [fol. 711] the United States to fully establish their claims in the manner provided by the Act to Regulate Commerce and file them in the receivership preeedings, or be guilty of such laches as to preclude recovery if they eventually should be held to be valid claims? We think not.

Who was hurt by the delay? If the theory of interveners is correct that the money taken in freight rates, repayment of which they were demanding, was wrongfully taken from them by duress, and that the Railroad Company became a trustee ex maleficio thereof, then the bondholders or mortgages of the Railroad Company had no right to it. Certainly the original stockholders of the Railroad Company had no such right. They were not injured by the delay. None of the parties were entitled to have the value of their properties enhanced by the wrongful appropriation

of others' moneys.

If the circumstances of this case are not so unusual and extraordinary as to excuse the claimed laches it would be difficult to conceive of a situation sufficient to accomplish Through all these years interveners against the constant opposition of the Railroad Company the Receivers and the Railway Company were attempting to collect the money wrongfully taken from them in unjust and excessive freight rates. If there has been unnecessary delay in presenting the claims for final action appellees have contributed thereto. To now say that appellants are barred by laches from insisting upon their rights would, it seems to us, make that doctrine an instrumentality to defeat rather than promote justice.

It is claimed interveners were bound by the interlocutory and final orders in the receivership proceedings and estonped from disregarding or assailing the validity of the decrees or the sale. The trial court so held, and such is the doctrine of the authorities. Under the holdings of this court interveners were in the same situation, bound by the same orders and decrees, and subject to the same estoppels as if they had been parties to the suit when the same were made. Swift v. Black Panther Oil & Gas Co., 244 Fed. 20; Commercial Electrical Supply Co. v. Curtis et al., 288 Fed. 657. To the writer there seems an apparent element of injustice in permitting a party to intervene and present his claim, take his evidence, go to the expense of a trial, and then say to him, "at the time you intervened your right; were barred by a final decree entered long prior to the time the court gave you the right to intervene." Such interfol. 712] vention becomes a useless procedure. Possibly the answer if, if parties do not desire to be so barred they should not intervene, but should bring an original bill.

It is urged by interveners that if they are bound by the orders and decrees entered before their intervention then they are entitled to any rights they might have if their petition of intervention had been actually on file at the time of the interlocutory and final decrees, and that if such be the situation they had claims remaining untried at the time of the entry of the final decree. and therefore the interlocutory decree and the final decree constitute no bar as to them; further, that if they were actually to be considered in the case prior to intervention they were entitled under the doctrine of Northern Pacific Railway Company v. Boyd, 228 U. S. 483, to a fair offer under the reorganization plan of stock or cash for their claims the same as other creditors, and that as no such offer was ever made the decree is void as to them. In the view we take of the matter there is no necessity of considering these somewhat interesting questions.

We are satisfied that while interveners are not estopped from prosecuting their demands by the general doctring of laches, they are under the decisions of this court bound by the terms of the final decree. They have proceeded on the theory of presenting their demands under the terms of that decree and in the intervening petitions assert their rights "pursuant to the final decree." We consider therefore the terms of that decree. It provides (Article 9) that the purchasers of the property shall take the same subject to "(B) Any unpaid claims of creditors of the defendant Railroad Company which have been or shall be admitted by

the parties in interest or adjudged by this Court to be prior in lien or superior in equity to the Refunding Mortgage or to the General Lien Mortgage." Article 10 thereof provides for the receivers filing statements showing:

- "(b) All unpaid indebtedness and liabilities contracted or incurred by the defendant Railroad Company prior to the appointment of the Receivers in the operation of the property directed by this decree to be sold, and which so far as they are informed are claimed to be prior in lien or superior in equity to the Refunding Mortgage;
- "(e) All claims and demands against the defendant Railroad Company which have been filed in this cause pursuant to the orders heretofore entered herein, save such [fol. 713] as may have been paid and discharged in full.
- "Notice having been given for the presentation in this cause of claims and demands against the defendant Railroad Company of every character and description whatsoever, and the time for the presentation of said claims having expired, no such claim or demand which has not been presented in this cause in accordance with the orders heretofore made requiring presentation thereof other than
- (2) any claim or demand which may arise after the entry of this decree,

shall be enforcable against the Receivers or against the property sold, or any part or portion thereof, or against any purchaser of the same or any part thereof, his successors or assigns."

The Receivers did not list the demands of interveners under subdivision (b) Article 10.

Does the provision of the final decree, "any claim or demand which may arise after the entry of this decree," cover the claims of interveners? The final decree endeavored to take care of certain contingencies. It was expected apparently that there were matters including certain claims and demands that would arise thereafter requiring action, and that some would be claimed to be prior in lien or superior in equity to the mortgage. If these arose after the final decree then they were not to be cut off by failure to file them in the receivership matter within the

time provided in the notices.

While the demands of interveners had not been brought officially to the attention of the trial court until August, 1916, the attorneys of the Railroad Company and the Receivers knew all about them prior thereto, for they were energetically contesting them in the courts. It would be quite natural that, knowing of these demands of the interveners being fought through the courts and that the effort would of course be made to collect out of the property if they were eventually successful, they would arrange some provision in the decree to provide for just such demands if they ripened into established claims. The Master interpreted the final decree to cover demands such as inter-[fol. 714] veners presented, holding that the word "arise" was not used in the sense of "accrue;" that a claim could not accrue against the Railroad Company after the entry of the final decree, for the Railroad Company stopped functioning when the Receivers were appointed, but that a claim could "arise" for the consideration and determination of the court after the entry of the final decree, and held these were such claims.

The trial court's conclusion was the reverse of this. We quote therefrom (North American Co. v. St. Louis & S. F. R. Co., 288 Fed. 612, 625) as follows: "The view of the special master was that the word 'arise' in the exception, other than any claim that may arise after the entry of this decree,' did not mean 'accrue,' and that, while the claims of the interveners did not accrue after the entry of the decree, they arose thereafter, and hence were excepted from what seems to the court to be the plain and comprehensive bar of all claims not presented as required by the interlocutory decree contained in that decree and in the final decree. But after thoughtful consideration the court is unable to adopt this view, or to resist the conclusion that the meaning of the word 'arise' in the connection in which it is here used was identical with the meaning of the word 'accrue'-that none of the claims of the interveners either arose or accrued after the entry of the decree, and that they all fall under the ban of both decrees."

The question therefore of the construction of this phrase of the final decree is of determinative importance. In ar. riving at the meaning of words courts must take into consideration their conjunction with other words, and the purpose of their use. The words "arise" and "arising" are of frequent occurrence the law, such as causes "arising under the Constitution and the law;" "unforeseen contingencies which may arise;" offenses "arising in the naval forces:" "causes of action arising." In United States v Heth, 3 Cranch 398, 413, the Supreme Court said, "The word 'arising' refers to the present time, or time to come. but cannot, with any propriety, relate to time past, and embrace former transactions." In Van Meter v. Coal Min. ing Co., 88 Iowa 92, 98, where the court was dealing with the phrase "unfor-seen contingencies which may arise." it considered the matter as "arisen" when it had "come into notice," or "become visible," and held that to the meaning of the word "arise." In Doughty v. Funk (Okl.). [fol. 715] 84 Pac. 484, the court construed the word "arise" to mean something more than is meant by the term "accrues" as used in a particular section of the Oklahoma statute. In Macon Grocery Co. v. Atlantic Coast Line R. R. Co., 215 U. S. 501, the court refers to a number of cases in the Supreme Court which discuss the question of when a case may be said to "arise" under the Constitution of the United States. In 3 Fed. Cases, No. 1596, discussing the question of when an offense "arises" in the land or naval forces within the meaning of the Fifth Amendment to the Constitution, the court says: "Among the ordinary and most common definitions of the word 'arise' are 'to proceed, to issue, to spring,' " Cyclopedia of Law and Procedure, Vol. 3, page 811, gives the same definition.

In Moran v. Moran, 144 Iowa 451, the Supreme Court of Iowa pointed out the difference between the words "accrue" and "arise" as used in a statute of limitations. In Love et al. v. North American Co. et al., 229 Fed. 103, 106, this court said, "The claims of the shippers arose at the time the Supreme Court of Oklahoma decided the appeals." The Supreme Court of the United States in Southern Pacific Co. et al. v. Darnell, 245 U. S. 531 and Louisville Ce-

ment Co. v. Int. Com. Comm., 246 U. S. 638, discusses the question of when a claim or right of action accrues. word "arise" in the decree is not used, we think, as synonymoas with "accrue" or in the sense of originating. used in the sense of the usual definition of the verb "arise," that is, to appear, to become, to present itself. It is evident the Receivers did not regard the claims of interveners as having arisen when the final decree was filed. were requird to file within a certain period of time a statement of unpaid indebtedness and liabilities of the Railroad Company incurred prior to their appointment, "and which so far as they are informed are claimed to be prior in lien or superior in equity to the Refunding Mortgage." They filed such list but did not include any claims of interveners, although they must have known from the pending litigation all about them, doubtless assuming as they were denying such claims and fighting their establishment in the courts that so far as they were concerned they were not claims that had as yet arisen for consideration of the court

having the receivership in charge.

It might be suggested also that while the right of action here accrued in 1914 when the Commission made an order of reparation, the claims were not finally established until [fol.716] the decision of the Supreme Court of the United States. They had not appeared in the transactions being carried on in the receivership proceedings. Had the Supreme Court sustained the decision of this court they never would have appeared. Interveners proceeded on the theory that they had the right under the final decree to present their claims as finally established by the Supreme Court of the United States. They were claims different from and unlike the ordinary creditors' claims. They must be prima facie established by the Commission's findings, and completely established by the judgment of a court. In any event we are satisfied that the word "arise" referred to claims or demands which had not been in the proceedings in the court up to the time the final decree was entered. The claims of interveners therefore did not "arise" in the receivership proceeding as the term is used in the final decree until the petitions of intervention were filed pursuant to the court's permission and order, thus bringing the matters before the court for its consideration.

If the final decree and order of confirmation constitute a contract between the court and the purchaser it is not breached, as under Article 9 of the decree the purchaser takes the property upon express condition that it will satisfy and discharge "(B) Any unpaid claims of creditors of the defendant Railroad Company which have been or shall be admitted by the parties in interest or adjudged by this Court to be prior in lien or superior in equity to the Refunding Mortgage or to the General Lien Mortgage:" and under section (e), subdivision 2 of Article 10 these claims or demands of interveners are not barred from consideration, because they "arise after entry of this decree" The Railway Company took the property therefore subject to the claims of interveners should they be allowed by the court as prior in lien or superior in equity to the mortgages. They expressly so agreed in accepting the property under the final decree.

Interveners contend their claims set forth in the petitions of intervention are entitled to preferential allowance with priority over claims of other creditors, including bond-holders, on three distinct grounds, viz.,

- (1) That they represent the excess freight charges unlawfully exacted from them or their assignors by duress, [fol. 717] and that therefore the defendant Railroad Company became a trustee thereof ex maleficio for their benefit.
- (2) That they come within the rule under which claims for labor, supplies and like necessities for the operation of a railroad are held to be preferential.
- (3) That a sound public policy requires they be allowed as preferential claims.

In view of our conclusion as to the first proposition we find it unnecessary to discuss the other two.

It is contended by appellees that the rates charged were the rates provided in the tariffs of the Railroad Company established, filed and published in conformity with the Interstate Commerce Act, and were the only rates which the Railroad Company could collect without a violation of the Act,—hence there was nothing of wrong in their collection.

Section 1, subdivision 3 of the Act to Regulate Commerce (U. S. Comp. Stat. 1916 Sec. 8563) provides, "All charges

made for any service rendered or to be rendered in the transportation of passengers or property be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful." Section 6 of the Act (U. S. Comp. Stat. 1916, Section 8569) in force when the disputed rates were collected, provides for the filing and posting by the Railroad Company of schedules of rates for transportation of property, and prohibits charging a greater or different rate than that provided in these tariffs. The Courts have held that even if the rates were unreasonable the shipper was bound to pay the same and could later apply to the Commission for reparation. Penna. R. R. Co. v. International Coal Co., 230 U. S. 184; Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426. It was held by the Commission in 1905 that the rates complained of and involved here were unreasonable and unjust. The Railroad Company did not change its rates and it is now insisted that, having refused to comply with the order of the Commission and having refused to change its tariffs, it was protected and justified in exacting the amounts which the Commission has held to be unreasonable because it had published them as its tariff rates. It could not, it is true, collect otherwise than according to its published tariff rates, but it could have changed its tariffs in the manner provided by the Act to [fol. 718] comply with Section 1 thereof and the order of the Commission. The fact that the Railroad Company continued to maintain its tariffs the same as before said finding is not a defense to it for collecting unreasonable and unjust rates. The charging of an excessive and unreasonable rate is ipso facto unlawful. Darnell-Taenzar Lumber Co. v. Southern Pac. Co., 221 Fed. 890. A carrier cannot make such rates lawful by continuing to publish them under Section 6 of the Interstate Commerce Act. After some fifteen years of litigation it was settled that the Railroad Company had exacted unreasonable and unjust freight rates to the extent of three cents per hundred weight on the shipments involved.

While ordinarily a trusteeship ex maleficio of money or property arises out of a fraud or deceit there is no reason why it may not arise out of duress or in any other "unconscientious manner." 3 Pomeroy's Equity Jurisprudence Sec. 1053, states the rule as follows: "In general, when-

ever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest equity impresses a constructive trust on the property thus acquired in favor of one who is truly and equitably entitled to the same."

In Angle v. Chicago, St. Paul & C. Railway, 151 U. S. 1, 26, the Supreme Court of the United States said, "It is familiar doctrine that a party who acquires title to property wrongfully may be adjudged a trustee ex maleficio in respect to that property." See also 1 Perry on Trusts, Sec. 166; 26 R. C. L. Sections 82 and 83, page 1236; Mercantile Trust Co. v. St. Louis & S. F. Ry. Co., 69 Fed. 193; Richardson v. New Orleans Debenture Redemption Co., 102 Fed. 780; Central Stock & Grain Exchange v. Bendinger, 109 Fed. 926; Ahrens v. Jones, (N. Y.) 62 N. E. 666; Lamb v. Rooney et al. (Neb.) 100 N. W. 410; Ryan and another v. Dox, 34 N. Y. 307; In re Wise's Estate (Pa.) 41 Atl. 526; 1 Pomeroy's Eq. Jur. 155.

A railroad company and a shipper do not stand on equal footing. A shipper is compelled to pay the rate provided in the tariff. His life as a shipper is terminated if he is [fol. 719] deprived of transportation to the market place, and if he pays an excessive and unjust rate provided by the tariff he is certainly acting under duress, and to the extent of the rates above a reasonable rate the Railroad Company should be held as a trustee ex maleficio for the shipper, the legal title to the exaction being in the Railroad Company, the beneficial title remaining in the shipper. The case of Love v. North American Co., 229 Fed. 103, would seem to be authority for this position. There excessive charges received by this same Railroad Company were held to belong to the shippers. This court there said, page 106:

"The question now might be properly asked, to whom do the excessive charges received by the Frisco Company for the transportation of freight belong? They certainly do not belong to the general creditors of the Frisco Com-

pany, nor to the bondlelders, nor the Frisco Company, itself. Without question they belong to the shippers. must not be deceived as to the true status of this claim, nor allow the bond, or the fact that the claim is presented by the Corporation Commission, to blind us to the fact that the claim is one due to the shippers for excessive charges paid by them to the Frisco Company for transportation of frieght. The shippers not only paid the lawful charge. but they did more. They paid an excessive charge. That payment was an illegal exaction, and, as against the railroad company, and volunteers, like the receivers, the money belonged to the shippers after the payment the same as before. It will be presumed that it was a part of the money in the treasury of the company which passed to the receivers. That money came into the hands of a court of equity. What ought such a court to have done with it? Surely it could do nothing but direct that it be returned to the shippers to whom it belonged. It having been paid to the bondholders, or for permanent betterment of the property for their benefit through the agency of a court of equity, that court, as a court of conscience, can do no less than direct its restoration."

In Southern Pac. Co. v. Darnell-Taenzer Co., 245 U. S. 531, 534, the Supreme Court said: "The carrier ought not

to be allowed to retain his illegal profit."

Appellees strongly urge in their brief that the trust fund theory cannot apply to make these claims preferential and give priority, because the moneys received for the freight charges were used by the Company the same as other [fol. 720] moneys, and that neither the Railroad Company nor the Receivers retained the same in a separate fund; that they were co-mingled with other moneys of the Railroad Company in the various banks and may have gone into an account which was wholly wiped out; that the proceeds cannot be allowed into the hands of the Receivers and the lien claimed thereon, but that the most interveners could claim would be to come in as general creditors. Of course, it is true that these moneys wrongfully exacted in freight rates were co-mingled with other funds, and cannot be traced in any separate and distinct fund into the hands of the Receivers. They were not in any way earmarked. that is essential to create a trusteeship ex maleficio and give

to interveners the status of preferred creditors then they must fail. While it has been held by the courts that in order for a cestui que trust to claim the right to preferential payment by a Receiver out of proceeds of the estate of an insolvent "that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receivers," Empire State Surety Co. v. Carroll County et al., 194 Fed. 593, 604 Weideman v. Newton Arms Co., 271 Fed. 302, vet the case of Love et al. v. North American Co. et al. 229 Fed. 103 is the latest expression of this court on the subject and is authority for the proposition that in order to establish a trust in a railroad company for the benefit of the shipper as to 'reight charges wrongfully exacted, it is not necessary to show that the identical money received has been placed in a separate account, or to trace the identical fund. It is established by the record here that at all times after the excessive freight charges were collected and down to the receivership the Railroad Company had in its treasury money in excess of the claimed overcharges, and that it turned over to the Receiver some \$300,000.00. doctrine of the Love case it will be presumed that the money exacted by duress from the interveners and their assignors for unjust and excessive freight rates was a part of the money in the treasury of the company which passed to the Receivers. Efforts are made in argument to distinguish the Love case from this, but on the question we are now considering there is no substantial difference.

It is insisted that the action to charge the Railroad Company as a trustee ex maleficio cannot be maintained be [fol. 721] cause the same is not consistent with the Act to Regulate Commerce, and that such Act prescribes an exclusive remedy by reparation. The Act does provide for reparation. It also provides, Section 22 that, "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

In Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 446, the Supreme Court referring to Section 22 said: "This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued

existence of which wou'l be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." This decision settles the proposition that common law remedies inconsistent with provisions of the act cannot be resorted to, but if these common law remedies are not inconsistent with the act they are not abrogated. Section 22 is not inconsistent with the provision providing for a suit for damages. The equitable renedy to impress a trust on money wrongfully and unlawfully taken from a shipper is not destroyed by the procodure to secure a judgment for repayment of the same. It is postponed, of course, until after action by the Commission and possibly by the courts. If interveners had gone into the receivership proceedings and attempted to enforce the trust without having their right to reparation first established by the Commission the court would undoubtedly have required them to proceed first before the commission. They endeavored to secure the establishment of their claims as judgments before attempting to impress a trust upon the fund. We see no inconsistency in this. The equitable remedy merely assists in bringing about justice by the impression of a trust and makes possible a realization upon the judgments. It is in aid of the judgments. We see no reason why an action at law for money had and received bars an equitable right to enforce a trust ex maleficio after said indement is secured, in aid thereof. Interveners had only the one remedy at the time they proceeded before the Interstate Commerce Commission, and that remedy had to be pursued to a conclusion before any other became available. Consequently there is no doctrine applicable to that situation of election of remedies. 20 C. J., p. 21. Further, as said in 39 Cyc, p. 591, "As a general rule the jurisdiction of equity in establishing and enforcing trusts is in addition to and concurrent with any remedies at law the party [fol. 722] may have." See also 6 L. R. A. (N. S.) 793; Fitzgerrell v. Federal Trust Co. (Mo.), 187 S. W. 600; Krippendorf v. Hyde & Another, 110 U. S. 276.

It is also argued that under Section 16 of the Act to Regulate Commerce interveners can have no other status than general unsecured creditors with no rights of priority, because the Act provides for collecting "damages". While the statute refers to the right to collect damages, the damages in this case are the amounts of money wrongfully taken. There is no particular sanctity surrounding the term "damages". As pointed out in the Master's conclusions of law, if money is taken from a party by duress he is damaged; if it is taken from him by a highwayman at the point of a revolver he is damaged; if it is taken from him by deceit and fraud he is damaged and he may sue for tort, or he may sue to impress a trust. In Mills v. Lehigh Valley R. R. Co., 238 U. S., 473, 481-482, the Court said:

"What the Commission decided was that the shippers were entitled to reparation, that is, to be made whole to be compensated for a loss because of an illegal and unreasonable exaction, and the amount which they stated as the sum to be paid 'as reparation' on the specified shipments was the amount which they found necessary to accomplish the reparation,—to afford the compensation. The statute was not concerned with mere forms of expression and in view of the decision that a finding of the ultimate fact of the amount of damage is enough to give the order of the Commission effect as prima facie evidence, we think that the trial court did not err in its ruling. The statutory provision merely established a rule of evidence. It leaves every opportunity to the defendant to contest the claim. But when the Commission has found that there was damage to a specified extent, prima facie the damage is shown." It may be observed that the judgments in the cases in the United States District Court at Kansas City were not for damages in the usual and technical sense of that term. We quote from the entry in the E. B. Spiller case: "It is further ordered, adjudged and decreed by the Court that Plaintiff E. B. Spiller do have and recover of and from the defendant, St. Louis & San Francisco Railroad Company the sum of Twenty-seven Thousand Six Hundred Eightytwo and 75/100 Dollars (\$27,682.75) being the amount of principal and interest ordered by the Interstate Commerce Commission to be paid to the plaintiff E. B. Spiller by the [fol. 723] said St. Louis & San Francisco Railroad Company on or before June 15, 1914, and do have and recover of and from said defendant the further sum of Two Thousand Five Hundred Twenty-nine and 56/100 Dollars (\$2-529.56) being the interest at six per cent per annum on said sum of \$27,682.75 from June 15, 1914 to Aug. 1, 1916.

being a total sum of Thirty Thousand Two Hundred Twelve and 31/100 Dollars (\$30,212.31) together with interest thereon from August 1, 1916 at six per cent per annum until paid." However, interveners were damaged to the extent of the money wrongfully taken from them. No other damage was claimed. It makes little difference what technical words may be used to describe what may be recovered, the judgment was for moneys paid by interveners and their assignors above reasonable and just rates for the transportation of property. Spiller v. Atchison, T. & S. F. Rv. Co., 253 U. S. 117.

It is true that interveners never attempted to enforce the trust until the intervening petitions were filed on December 2, 1920. It may be that there are other methods of procedure which might better have been followed, but we are not convinced that interveners were estopped to assert the trust theory after final judgment by reason of not having before asserted it, especially in view of all the circumstances surrounding these transactions and the fact that full notice was given to the Railway Company before the foreclosure sale was confirmed of interveners' claims of priority by reason of the wrongful collection of the exces-

sive rates.

We do not think the interveners are entitled to recover upon the theory of the rule underlying the right to preferential claims of labor, supplies, etc., and agree with the decision of the trial court as to that question; nor is it necessary to consider the question of public policy urged; nor in view of our conclusion as to a trusteeship ex maleficio is it necessary to consider the effect of the doctrine announced in Northern Pacific Ry. v. Boyd, 228 U. S. 482, as to the right of a creditor, who has received no fair offer in the reorganization plan of eash or participation, to subject the interest of the old stockholders in the property to the payment of his claims. It may be suggested that the interveners received no offer of any kind and that the stockholders of the Railroad Company have been given an interest in the reorganized Railway Company to the extent of more than \$45,000,000.00.

[fol. 724] Under the theory we have adopted as applicable to the facts of these cases the claims for attorney fees can-

not be established as preferential claims.

It would seem a reproach to equity if it did not afford a remedy to interveners under the situation presented by Against the constant opposition of the Rail. road Company, its Receivers and the Railway Company their claims have been established in the District Court and the Supreme Court of the United States. Other ered. itors, bondholders, mortgagees, stockholders, acquired no interest of any kind in these excessive and unjust charges Preferential allowance of the claims arising therefrom takes nothing from them to which they are entitled. The Railway Company received the property of the Railroad Company subject to these claims if allowed by the court as we have before pointed out, and hence suffers no wrong Every consideration of equity and fair dealing demands that these claims should not be lost in a labyrinth of technicalities.

We hold that appellants were not guilty of inexcusable laches and that it was error to dismiss their petitions upon that ground; that they are not precluded by the final decree and order of the comfirmation of sale from asserting the claims set forth in the petitions of intervention; that the Railroad Company in collecting the overcharges became a trustee ex maleficio of interveners' funds, and that the Railway Company accepted said properties subject to these claims should they be allowed by the court; that intervener, E. B. Spiller, is entitled to have the claims set forth in his petition of intervention established in the sum of \$30,212.31 (not including any attorney fees) with interest from August 1. 1916, and interveners, E. B. Spiller et al., are entitled to have their claims established in the sum of \$3,652.97 (not including attorney fee) with interest at six per cent from August 1, 1916 as preferential claims superior to the rights of other creditors, including the bondholders, and the order and decree of the trial court dismissing the interveners' petitions is reversed and the case is remanded with instructions to enter judgment for the amounts herein set forth, the same to be adjudged as prior in lien and superior in equity to the Refunding Mortgage and General Lien Mortgage of the St. Louis & San Francisco Railroad Company, and directed to be enforced against the property conveyed [fol. 725] to the St. Louis & San Francisco Railway Company as assignee of the purchasers at the foreclosure sale had in the consolidated receivership case.

Reversed and remanded.

[fol. 726] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

#### [Title omitted]

#### Decree-June 24, 1926

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the order and decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that E. B. Spiller and E. B. Spiller, et al., have and recover against the St. Louis and San Francisco Railroad Company, and St. Louis-San Francisco Railway Company, the sum of — Dollars for their costs in this behalf expended and have execution therefor.

It is further ordered that this cause, be, and the same is hereby, remanded to the said District Court with instructions to set aside the order and decree dismissing the interveners' petitions and to enter a decree in favor of intervener E. B. Spiller for Thirty Thousand Two Hundred Twelve and 31/100 (\$30,212.31) Dollars, with interest at six per cent from August 1, 1916, and in favor of interveners E. B. Spiller, et al., for Three Thousand Six Hundred [fol. 727] Fifty-two and 97/100 (\$3,652.97) Dollars, with interest at six per cent from August 1, 1916, the same to be adjudged as prior in lien and superior in equity to the Refunding Mortgage and General Lien Mortgage of the St. Louis & San Francisco Railroad Company and directed to be enforced against the property conveyed to the St. Louis & San Francisco Railway Company.

[fol. 728] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 729] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 1, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3645)





### FILE COPY

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AUG 20 1926

WM. R. STANSBIL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

P No. 577

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY AND ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, PETITIONERS,

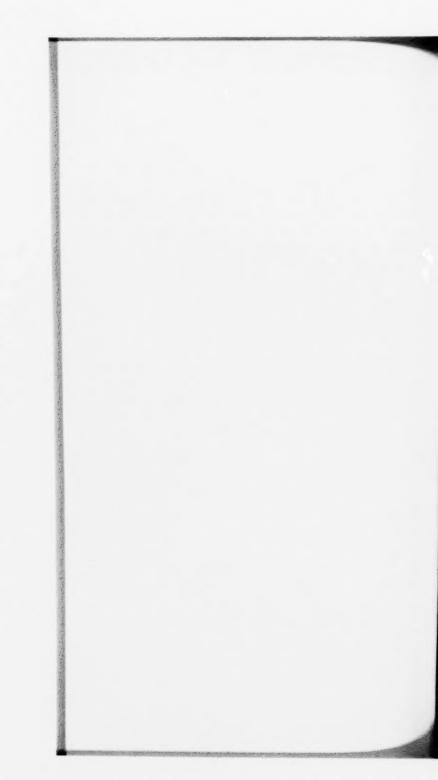
v.

E. B. SPILLER ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

EDWARD T. MILLER, ALEXANDER P. STEWART, Attorneys for Petitioners.

Frisco Building, St. Louis, Missouri.



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#### IN THE

## SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1926.

No.....

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY AND ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Petitioners,

v.

E. B. SPILLER ET AL., RESPONDENTS.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your petitioners, St. Louis and San Francisco Railroad Company (hereinafter referred to as the Railroad Company) and St. Louis-San Francisco Railway Company (hereinafter referred to as the Railway Company), respectfully represent and show to the Court that the United States Circuit Court of Appeals for the Eighth

Circuit has reversed an order and decree entered by the District Court of the United States for the Eastern District of Missouri, dismissing intervening petitions filed by respondents (hereinafter referred to as interveners) in a certain cause therein pending entitled "North American Company, Complainant, v. St. Louis and San Francisco Railroad Company, Defendant, No. 4174, Consolidated Cause Final," whereby interveners sought to establish as preferential claims against the property of the Railroad Company purchased on behalf of the Railway Company at foreclosure sale certain judgments, with interest thereon, obtained by interveners against the Railroad Company in the District Court of the United States for the Western District of Missouri, based on orders of reparation made by the Interstate Commerce Commission in respect of freight charges collected by the Railroad Company from interveners for the transportation of certain interstate shipments of cattle, and has remanded the proceeding in which said order and decree of dismissal was entered to said District Court, with instructions to enter judgment in favor of interveners for the amounts therein set forth, the same to be adjudged as prior in lien and superior in equity to the mortgages of the Railroad Company and directed to be enforced against the property conveyed to the Railway Company at said foreclosure sale (R. 722).

T.

#### STATEMENT OF MATTER INVOLVED.

In 1903 the Railroad Company advanced freight rates on cattle shipments from the State of Texas and other Western states to Kansas City, Chicago and other markets three cents per hundredweight. These rates were challenged by divers parties as unreasonable and unjust, the special challenge being by the Cattle Raisers' Association of Texas. The Interstate Commerce Commission (hereinafter called Commission) on August 16, 1905, found the rates were unjust and unreasonable to the extent of the advance of three cents per hundredweight made in 1903 (11 I. C. C. Rep. 296). The Commission made no order on this report and finding and reserved all questions of reparation (R. 243).

After the passage of the Hepburn Act of July 29, 1906, the Commission, on petition, reopened the case. After again trying the case in full, the Commission on April 14, 1908, again pronounced the rates excessive and unreasonable (13 I. C. C. Rep. 418), and made an order prescribing rates for the future to take effect November 17, 1908, being the rates existing prior to the advance made in 1903. Questions of reparation to be allowed only from August 29, 1906, were reserved by the Commission to be subsequently dealt with as specific claims were presented (R. 251, 269).

Between August 29, 1906, and November 17, 1908, the Railroad Company collected from certain shippers of cattle, whose claims are held by interveners, regularly and legally established freight rates, which the Commission on April 14, 1908, found to be unreasonable and unjust to the extent of about three cents per hundredweight. Interveners presented to the Commission claims for reparation based on said excessive rates collected from August 29, 1906, to November 17, 1908, and on January 12, 1914, the Commission ordered the Railroad Company to pay to interveners sums aggregating upward of \$30,000.00, including interest to June 15, 1914, as reparation for damages sustained by interveners as the result of the excessive charges so collected (R. 272, 274, 277).

On December 29, 1914, interveners filed suits against the Railroad Company in the District Court of the United States for the Western District of Missouri, at Kansas City, on the orders of reparation made by the Commission (R. 277, 287). On August 16, 1916, interveners recovered judgments in said suits, with interest thereon from August 1, 1916 (R. 288), and such judgments were subsequently on appeal affirmed by this Court on May 17, 1920 (253 U. S. 117), the mandate of this Court being filed in the District Court on June 6, 1920 (R. 292).

On May 27, 1913, on the bill of complaint of North American Company (a general creditor), filed in the District Court of the United States for the Eastern District of Missouri, that court appointed receivers for all of the property of the Railroad Company for the benefit of all its creditors as their interests might appear (R. 11). The receivers took possession of all its property and proceeded to operate it and to distribute the proceeds thereof to its creditors. On April 3, 1914, a like bill was filed by another creditor, and that suit was consolidated with the suit of North American Company. On May 29, 1914, in this consolidated cause, the District Court rendered an interlocutory decree (R. 601) to the effect that all of the property of the Railroad Company was thereby impounded, sequestered and set apart to pay the debts and obligations of the Railroad Company; that all parties who claimed any interest in or lien upon any of the property of the Railroad Company in the hands or control of the receivers should file verified statements of their claims with the Special Master on or before October 1, 1914, and that each of them who failed or refused so to do should, by such failure, be barred from receiving any share in the distribution of any of said funds of the property or of the proceeds thereof. Notice of this order and of the limitation of the time for the presentation of claims, in order to permit the holders thereof to derive any benefit from or share in the distribution of the property in the hands of the receivers or of its proceeds, was ordered to be and was duly given by proper publication of the order itself (R. 603). By subsequent orders the court extended the time for the presentation of such claims, and that time finally expired on February 1, 1916 (R. 604).

On May 22, 1914, the trustees under the general lien mortgage of the Railroad Company, dated August 27. 1907, filed bill for foreclosure. On July 9, 1914, the trustees of the Railroad Company's refunding mortgage dated June 20, 1901, filed bill for foreclosure. The same receivers theretofore appointed were appointed in these proceedings, who immediately took possession of and impounded all the mortgaged property for the benefit of the mortgage bondholders, and by proper orders all these suits were consolidated into a single suit entitled "North American Company, Complainant, v. St. Louis and San Francisco Railroad Company, Defendant, No. 4174, Consolidated Cause Final," and the final decree of foreclosure and sale was rendered in this consolidated cause and in each of its constituent causes. Substantially all of the property of the Railroad Company was subject to the mortgages which were thereby foreclosed.

On March 31, 1916, the final decree of foreclosure and sale of all the property of the Railroad Company was rendered (R. 558). On July 19, 1916, all this property was sold under that decree to purchasers for the Railway Company, which subsequently assumed their obligations and received and took charge of the property on or about November 1, 1916. On August 29, 1916, the court confirmed the sale after a hearing upon notice to all parties in interest (R. 636).

Interveners never filed any verified claim to any interest in or lien upon the property or the proceeds of the property of the Railroad Company in the hands of the receivers, as required by the terms of the interlocutory decree, under the provisions of which the time for filing such claims finally expired February 1, 1916. At the hearing on the application for confirmation of the sale on August 29. 1916, interveners gave notice to the parties to the consolidated cause that they had claims against the Railroad Company for illegal freight exactions that had been reduced to judgment in the United States District Court for the Western District of Missouri on August 16, 1916, that an appeal was being taken from that judgment by the Railroad Company, and that interveners would claim that their claims evidenced by that judgment were prior in lien and superior in equity to the liens and claims of every other party whomsoever upon and to the property of the Railroad Company in the hands of the receivers (R. 555). No other or further suggestion, presentation or action was made or taken by interveners to present or prove their claims on or to the property sold and delivered to the Railway Company under the foreclosure decree, or against the Railway Company, until December 2, 1920, when interveners applied to the District Court for leave to file their intervening petitions in the consolidated receivership suit.

The Court granted the application for leave to file such intervening petitions on February 12, 1921 (R. 13, 57); such petitions were filed and referred to a Special Master, who, after hearing same and making extended findings of fact and conclusions of law, recommended that judgment be entered in favor of interveners for the amounts of the judgments awarded by the United States District Court at Kansas City, with interest thereon from August 1, 1916,

and that the entire amount be adjudged as prior in lien and superior in equity to the refunding and general lien mortgages of the Railroad Company, and that it should be enforced against the property conveyed to the Railway Company (R. 123). Exceptions to the report of the Master were filed by the Railroad Company and by the Railway Company (R. 180, 198). The District Court did not sustain the conclusions of law of the Master and ordered and adjudged that the exceptions to those parts of the report of the Master, which were contrary to or inconsistent with the views expressed by the Court in its memorandum opinion filed, should be and were sustained, and dismissed the intervening petitions of interveners (R. 222, 223).

From the order and decree of the court dismissing their intervening petitions interveners appealed to the Circuit Court of Appeals, which court on June 24, 1926, by its order and decree reversed the order and decree of the District Court and remanded the case to the District Court with instructions to enter judgment in favor of interveners for amounts equivalent to the judgments obtained by interveners in the United States District Court at Kansas City, with interest thereon from August 1, 1916, the same to be adjudged as prior in lien and superior in equity to the refunding and general lien mortgages of the Railroad Company, and directed to be enforced against the property conveyed to the Railway Company as assignee of the purchasers at the foreclosure sale had in the consolidated receivership case (R. 722).

In its opinion filed on such decision, said Circuit Court of Appeals held:

1. That interveners were not barred from presenting their claims by laches, either

(a) by reason of their delay, or

- (b) by reason of failing to file their claims as required by the interlocutory decree entered in the receivership case.
- 2. That while interveners were bound by the terms of the interlocutory and final decrees and the order of confirmation of the sale, yet interveners were entitled to present their claims after the expiration of the time limited thereby, first, because they were claims different from and unlike ordinary creditors' claims, and, second, because they arose after the entry of the final decree, and hence the Railway Company took the property of the Railroad Company subject to the claims of interveners should they be allowed by the court as prior in lien or superior in equity to the mortgages, under the provisions of Article Ninth of the final decree, that the purchasers of the property should take the same subject to
  - "(B) Any unpaid claims of creditors of the defendant Railroad Company which have been or shall be admitted by the parties in interest or adjudged by this court to be prior in lien or superior in equity to the Refunding Mortgage or to the General Lien Mortgage" (R. 587);

and under the provisions of Article Tenth of the final decree providing:

"(e) \* \* \* Notice having been given for the presentation in this cause of claims and demands against the defendant Railroad Company of every character and description whatsoever, and the time for the presentation of said claims having expired, no such claim or demand which has not been presented in this cause in accordance with the orders heretofore made requiring presentation thereof other than \* \* \*

"(2) Any claim or demand which may arise after the entry of this decree, shall be enforceable against the receivers or against the property sold, or any part or portion thereof, or against any purchaser of the same or any part thereof, his successors or assigns" (R. 589, 590).

3. That the Railroad Company became a trustee ex maleficio for the benefit of interveners of the moneys collected from interveners in excess freight charges afterwards found by the Commission to be unjust and unreasonable and hence unlawful.

4. That interveners were entitled to preference and priority of payment in respect of their claims under the trust fund doctrine, notwithstanding the excess freight charges collected by the Railroad Company from interveners could not be and were not traced into any separate and distinct fund or into any specific property of the Railroad Company in the hands of the receivers, or in the hands of the Railway Company as the purchaser of the property of the Railroad Company.

5. That the action to charge the Railroad Company as a trustee ex maleficio was not inconsistent with the remedy provided by the Act to Regulate Commerce, i. e., an action at law for damages based on an order of reparation made by the Interstate Commerce Commission; that the equitable remedy to impress a trust on moneys wrongfully or unlawfully taken from a shipper in unreasonable and excessive freight charges is not destroyed or abrogated by the provisions of the Act to Regulate Commerce prescribing the remedy and procedure to secure a repayment of the same; and that interveners were not estopped from maintaining their equitable action to charge the Railroad Company as a trustee ex maleficio because of their election to pursue their remedy by reparation under the Act to Regulate Commerce.

6. That interveners were entitled to have their claims set forth in their petitions of intervention established as preferential claims superior to the rights of other creditors, including the bondholders, in the amounts of the judgments obtained by them against the Railroad Company in the District Court at Kansas City, with interest from August 1, 1916, which was more than three years after the date of the appointment of the receivers of the property of the Railroad Company on May 27, 1913.

#### II.

### REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI.

Your petitioners respectfully submit:

- 1. That the Circuit Court of Appeals for the Eighth Circuit, in holding that the freight rates in question were wrongfully and unlawfully collected, because later found by the Commission to be unjust and unreasonable, notwithstanding such rates were, when collected, the regularly and legally established rates, has decided a Federal question in a way in conflict with the applicable decisions of this Court.
- 2. That said Circuit Court of Appeals, in holding that a carrier becomes chargeable as a trustee ex maleficio because of the collection of rates thereafter found by the Commission to be unjust and unreasonable, although such rates were the legally established rates at time of collection, has decided an important question of general law in a way untenable and in conflict with the weight of authority, and has decided an important question of Federal law which has not been, but should be, settled by this Court.
- 3. That said Circuit Court of Appeals, in holding that, in order to establish a trust in a railroad company for

the benefit of a shipper as to freight charges wrongfully collected because unjust and unreasonable, and to give to such shipper the status of a preferred creditor, it is not necessary to show that the identical money received was placed in a separate account, or to trace the identical fund, has decided a question of general law in a way untenable and in conflict with the weight of authority, and particularly in conflict with the decisions of other circuit courts of appeals on the same matter.

4. That said Circuit Court of Appeals, in holding that an action to charge a railroad company as trustee ex maleficio is not inconsistent with, nor abrogated by, the remedy by reparation provided by the Act to Regulate Commerce, and that interveners were not precluded from pursuing the equitable remedy by reason of having prosecuted an inconsistent remedy by reparation, has decided an important question of Federal law which has not been, but should be, settled by this Court.

5. That said Circuit Court of Appeals, in holding that interveners are not estopped to urge their claims by laches by reason of failure to file said claims pursuant to the provisions of the interlocutory decree in the receivership suit against the Railroad Company, has rendered a decision in conflict with the decisions of other circuit courts of appeals and in conflict with applicable decisions of this Court on the same matter.

6. That said Circuit Court of Appeals, in holding that interveners' claims arose after the entry of the final decree in the receivership suit against the Railroad Company, and that the word "arise," as used in Article Tenth of said final decree, was not synonymous with the word "accrue," has decided an important question of general law in a way untenable and in conflict with the weight of authority.

7. That said Circuit Court of Appeals, in holding that interveners were entitled to have their claims established as preferential claims superior to the rights of other creditors in the amounts of the judgments obtained by them against the Railroad Company in the District Court for the Western District of Missouri, with interest thereon from August 1, 1916, which was more than three years after the date of the appointment of receivers of the property of the Railroad Company on May 27, 1913, has decided an important question of general law in a way untenable and in conflict with the weight of authority.

Your petitioners believe that the aforesaid decree of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of the Act of Congress in such cases

made and provided.

### III.

### PRAYER.

Wherefore your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the said case therein, entitled E. B. Spiller et al., Appellants, v. St. Louis and San Francisco Railroad Company et al., Appellees, No. 6,786, to the end that the said case may be reviewed as provided in Judicial Code, Section 240, as amended.

And your petitioners pray that the certified copy of the record and proceedings of said Circuit Court of Appeals, which is filed as a part of and as an exhibit to this petition, may be treated as a return to said writ of certiorari; and your petitioners pray that they may have such other and further remedies and relief in the premises as to this Court may seem appropriate and in conformity with law; and that the said decree of said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioners will ever pray.

(Ep) Ermand T. Killer

Attorneys for Petitioners.

State of Missouri, | ss City of St. Louis. Swar T. Hiller

Alexander P. Stewart, being duly sworn, makes oath and says that he is attorney for petitioners in the above cause; that he has read the foregoing petition and knows the contents thereof, and that the allegations therein are true as he verily believes.

(Eps) Erwas T. Killer

Subscribed and sworn to before me on this ....day of

August, 1926. My commission expires 13 /928

(C.S.) (Sys) bracier Kinds Notary Public.

I hereby certify that I have examined the foregoing petition, and in my opinion the said petition is well founded in law, and the case is one in which the prayer of the petitioners should be granted.

(Syd) Erword T. Miles.
Attorney for Petitioners.

#### IN THE

# SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1926.

No.....

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY AND ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Petitioners,

v.

E. B. SPILLER ET AL., RESPONDENTS.

### BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

### OFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW.

Opinion filed in District Court August 23, 1922, on Exceptions to Report of Special Master; North American Company v. St. Louis and San Francisco Railroad Company; Spiller v. Same; Spiller et al. v. Same, 288 Fed. 612 (R. 199).

Opinion of Circuit Court of Appeals filed June 24, 1926; E. B. Spiller et al. v. St. Louis and San Francisco Railroad Company et al., .... Fed. (2nd) .... (R. 699).

### GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

1. The date of the decree of the Circuit Court of Appeals for the Eighth Circuit to be reviewed.

The opinion of the Circuit Court of Appeals and its decree reversing the decree of the District Court for the Eastern District of Missouri were filed and entered June 24, 1926 (R. 722).

2. The specific claims advanced, and rulings made, in the lower court which are relied upon as a basis of this Court's jurisdiction.

In the Circuit Court of Appeals petitioners advanced the specific claims:

(a) That interveners were guilty of inexcusable laches in failing to file their claims or demands in the receivership suit as required by the interlocutory decree rendered therein, and that their claims were properly dismissed by the District Court.

(b) That interveners were precluded by the final decree and order of confirmation of sale from asserting any claim against the railway company or

its property.

(c) That the railroad company in collecting freight charges at the rates then legally in effect did not become a trustee ex maleficio.

(d) That the trust fund doctrine could not be invoked by interveners.

(e) That the trust fund theory was inconsistent with and abrogated by the Act to Regulate Commerce, and by the exclusive remedies for collection by reparation prescribed by that act.

(f) That interveners' claims were not preferred debts of the Railroad Company and if allowable at all could only be established as general unsecured cred-

itors' claims.

The Circuit Court of Appeals ruled:

(1) That interveners were not guilty of laches in failing to file their claims, and it was error to dismiss their intervening petitions on that ground (R. 722).

(2) That interveners' claims arose after the entry of the final decree and interveners were not precluded by the final decree and order of confirmation of sale from asserting said claims (R. 722).

(3) That the Railroad Company in collecting rates which the Commission later found to be unjust and unreasonable, and therefore unlawful, became a trustee ex maleficio (R. 722).

(4) That interveners could invoke the trust fund doctrine, even though the moneys collected could not be traced into any distinct fund or into any specific property (R. 718).

(5) That an equitable action based on the trust fund doctrine was not inconsistent with the remedy by reparation prescribed by the Act to Regulate Commerce (R. 719).

(6) That interveners were entitled to have their claims established as preferential claims superior to the rights of other creditors, including the bondholders, in the amounts of the judgments obtained by them against the Railroad Company, with interest from August 1, 1916, a

date more than three years after the date of appointment of the receivers on May 27, 1913 (R. 722).

 Statutory provision under which this Court's juris. diction is invoked.

Sec. 240 (a) of the Judicial Code, as amended February 13, 1925 (Chap. 229, Sec. 1, 43 Stat. 938; Sec. 1217, U. S. Comp. Stat. Cum. Supp. 1925).

 Cases believed to sustain the jurisdiction of this Court.

Spiller v. Atchison, Topeka & Santa Fe Railway Co., 253 U. S. 117, in which this Court granted writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit.

Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U. S. 184.

Schuyler v. Littlefield, 232 U.S. 707.

Keogh v. Chicago & Northwestern Railway Co. et al., 260 U. S. 156.

### STATEMENT OF THE CASE.

Petitioners respectfully refer to "Statement of Matter Involved" set forth in the foregoing petition for certiorari, pages 2 to 10. which statement of the case is incorporated herein by reference.

## SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

- 1. The Circuit Court of Appeals erred in holding that collection of legally established tariff rates was unlawful because they were later found to be unjust and unreasonable.
- 2. The Circuit Court of Appeals erred in holding that the Railroad Company became chargeable as trustee ex maleficio in respect of the excessive charges collected.
- 3. The Circuit Court of Appeals erred in holding that the trust fund doctrine could be invoked by interveners.
- 4. The Circuit Court of Appeals erred in holding that an action to charge the Railroad Company as trustee ex maleficio was not inconsistent with the remedy by reparation prescribed by the Act to Regulate Commerce.
- 5. The Circuit Court of Appeals erred in holding that interveners were not guilty of laches in failing to file their claims.
- 6. The Circuit Court of Appeals erred in holding that interveners' claims arose after the entry of the final decree and were not barred.
- 7. The Circuit Court of Appeals erred in holding that interveners were entitled to have their claims allowed as preferential claims superior to the claims of other creditors, including the bondholders.
- 8. The Circuit Court of Appeals erred in holding that interveners were entitled to interest on the amounts of their claims (judgments) from August 1, 1916.

#### ARGUMENT.

I.

The decision of the Circuit Court of Appeals that the collection of legally established rates becomes wrongful and unlawful, because such rates are subsequently found by the Commission to be unjust and unreasonable, is erroneous and is in conflict with applicable decisions of this Court.

The charges which form the basis of respondents' claims were collected by the Railroad Company between August 29, 1906, and November 17, 1908. On April 14, 1908, the Commission found the rates to be unjust and unreasonable, and made an order prescribing rates for the future, to take effect November 17, 1908. On January 12, 1914, the Commission made an order of reparation in respect of the excessive charges collected by the Railroad Company during the period mentioned.

The rates collected by the Railroad Company were the lawful tariff rates in effect at the time, and the Railroad Company was under an absolute obligation not only to collect, but to retain, the published rates, whether reasonable or unreasonable, discriminatory or nondiscriminatory.

In Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 437, this Court held:

"The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the act and the punishments which it imposed were directed not only against carriers but against shippers, or any person who, directly or indirectly, by any machination or device, in any manner whatsoever, accomplished the result of producing the wrongful discriminations or preferences which the act forbade."

In Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U. S. 184, 197, this Court said:

"The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged too much and then make a corresponding rebate, nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper (February 4, 1887, 24 Stat. 379, c. 104, \$2; March 2, 1889, 25 Stat. 855, c. 382, \$6; Armour Co. v. United States, 209 U. S. 56, 83). The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation.

"In view of this imperative obligation to charge, collect and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between

free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid."

In Robinson v. Baltimore and Ohio Railroad Co., 222 U. S. 506, 508, it was said:

"The act (to Regulate Commerce), whilst prohibiting unreasonable charges, unjust discriminations and undue preferences by carriers subject to its provisions, also prescribed the manner in which that prohibition should be enforced; that is to say, the act laid upon every such carrier the duty of publishing and filing, in a prescribed mode, schedules of the rates to be charged for the transportation of property over its road, declared that the rates named in schedules so established should be conclusively deemed to be the legal rates until changed as provided in the act, forbade any deviation from them while they remained in effect."

No order was, or could have been, entered by the Commission in August, 1905, requiring the Railroad Company to cease and desist from collecting the rates held to be unreasonable for the future, as the Commission did not at that time have power to prescribe rates for the future. It was merely the conclusion of the Commission that the rates then in effect were unjust and unreasonable (11 I. C. C. Rep. 296, 352).

The language used by Judge Sanborn, in his opinion filed in the District Court on dismissing the intervening petitions of respondents, is peculiarly apt (288 Fed. 612, 629-630):

"The railroad company collected these legally established rates. It had the decision and direction of the highest judicial tribunal in the land for its justification, and this court is of the opinion that its collection of these rates was not unlawful. The prohibition of section 1 and that of section 6 must be read and interpreted together, and the correct construction of them is that the specific prohibition of section 6 constitutes an exception from the general prohibition of section 1. A construction that each prohibition is of equal force and equally applicable in such a case as that in hand would impose upon the carrier a penalty of a violation of section 1 if it complied with section 6, and the penalty of a violation of section 6 if it complied with section 1, and an interpretation which leads to such an absurdity ought to be rejected."

The decision of the Circuit Court of Appeals is not only in conflict with the above controlling decisions of this Court, but is further in conflict with the decision of the same Court of Appeals in the case of Chicago, B. & Q. R. R. Co. v. Merriam & Millard Co., 297 Fed. 1, 3, wherein it was said:

"The claim that the rate was unlawful cannot be sustained. The duly filed and published tariff rate, while it was in force, was the only lawful rate. \* \* \* It is not claimed that the carrier had made any change of these tariff rates at the time of these shipments. The report and opinion of the Commission filed on October 20, 1921, did not purport to and could not annul or change the existing tariff rate. \* \* \* Section 15 of the Interstate Commerce Act required that any change of the rates made by the Commission should be made, not by a report, finding or opinion, but by an order to the carrier to cease and desist from collection of the rate, to take effect not less than thirty days after the date of the order."

In support of its decision in the Merriam & Millard ease the Circuit Court of Appeals cited and relied upon the decision of the District Court (288 Fed. 612) in the case now sought to be reviewed; yet the same Court of Appeals, without reference to its decision in the Merriam & Millard case, now overrules the decision of the District Court in the instant case on which the decision in the Merriam & Millard case is founded.

#### II.

The decision of the Circuit Court of Appeals that the Railroad Company became chargeable as trustee ex maleficio of the excessive charges collected by it, and that the trust-fund doctrine could be invoked by respondents, is erroneous and in conflict with the decisions of this Court, with other decisions of the same Circuit Court of Appeals, and with the decisions of other Circuit Courts of Appeals, on the same matter.

The Circuit Court of Appeals held that the excessive charges were wrongfully and unlawfully collected by the Railroad Company, and that the Railroad Company thereby became chargeable as a trustee ex maleficio and that the trust fund theory could be invoked by respondents to make their claims preferential and to give them priority, notwithstanding the moneys collected from respondents could not be traced into a specific fund or into specific property which came into the hands of the receivers, and that it was not necessary so to trace such moneys.

There can be no fraud, actual or constructive, in which a trust ex maleficio must have its origin, where the Railroad Company collected the only charges permissible under the law, and where it would have been penalized had it attempted to collect, or had collected, charges other than those designated in the tariffs.

The Court of Appeals conceded (R. 717) that the moneys collected from respondents were comingled with other funds and could not be traced into any separate or distinct fund in the hands of the receivers; but holds that in order to establish a trust in a railroad company for the benefit of the shipper as to freight charges wrongfully exacted it is not necessary to show that the identical money received has been placed in a separate account or to trace the identical fund. In so holding the decision of Court is in conflict with the rule as established by the decisions of this Court and of other Circuit Courts of Appeals.

The proceeds of a trust fund or property wrongfully converted by a trustee can be followed by the cestui que trust and the trust impressed thereon as against the trustee only so long as they can be identified and traced either in their original form or in other funds or property in the hands of the trustee, and where this cannot be done the cestui que trust is not entitled to follow such proceeds into the hands of the trustee or his representative and claim a lien thereon, but is entitled only to come in as one of the general creditors of the trustee.

In Litchfield v. Ballou, 114 U. S. 190, 195, this Court said:

"If the complainants are after the money they let the city have, they must clearly identify the money, or the fund, or other property which represents that money, in such a manner that it can be reclaimed and delivered without taking other property with it, or injuring other persons or interfering with others' rights."

See also, Schuyler v. Littlefield, 232 U. S. 707.

The decision of the Circuit Court of Appeals is clearly in conflict with the above decisions of this Court. That decision is further in conflict with the previous decisions of the same Circuit Court of Appeals in the following cases:

Empire State Surety Co. v. Carroll County, 194 Fed. 593, wherein the fifth syllabus reads:

"It is indispensable to the maintenance by a cestui que trust of a claim to preferential payment out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver."

State Bank of Winfield v. Alva Security Bank, 232 Fed. 847, 849, wherein it was said:

"The capital defect, however, of plaintiffs' theory is their treatment of the grand division of the bank's assets in its reports known as 'Cash and Sight Exchange' as a 'fund' within the law relating to the following of trust funds. To adopt that theory is to re-establish under a mere bookkeeping disguise the exploded notion that a trust fund may be recovered if it can be traced into the general assets of an insolvent estate. The courts have shown a tendency to restrict the 'trust fund' doctrine (Empire State Surety Co. v. Carroll County, 194 Fed. 593, 114 C. C. A. 435; Board of Commissioners v. Strawn, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. [n. s.] 1100; In re Brown, 193 Fed. 24; Commercial National Bank v. Armstrong [C. C.], 39 Fed. 684). The rule is accurately stated and numerous authorities cited by this Court in the first case referred to as follows:

"'It is indispensable to the maintenance by a cestui que trust of a claim to preferential pay-

ment by a receiver out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver."

Also, Central State Bank v. McFarlin, 257 Fed. 535, and Scullin Steel Co. v. North American Co., 255 Fed. 945.

Said decision is further in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of Weideman v. Newton Arms Co., 271 Fed. 302, 304, wherein it was said:

"But even if the trust relation be established, if the trustee is in bankruptcy or insolvency, it is absolutely necessary to trace the money covered by the trust into some particular property or fund. It is just as necessary to trace as it is to prove the trust relation. There is no pretense of tracing this money into the receiver's hands in any other sense than that the money was spent in carrying on a business or procuring certain articles of machinery and the like, which ultimately passed into the receiver's hands. This is not enough; cash is never traced merely by showing that it went into a general estate. This subject we have recently treated in Re Bolognesi, 254 Fed. 770, 166 C. C. A. 216; Re Matthews, 238 Fed. 785, 151 C. C. A. 635, and Re Jarmulowsky, 261 Fed. 779."

Said decision is further in conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit in the cases of Titlow v. McCormick, 236 Fed. 209, and United States National Bank of Centralia v. City of Centralia, 240 Fed. 93.

There was no fraud, either actual or constructive, committed by the Railroad Company in this case. There was no fiduciary relation between the Railroad Company and the shippers, and no relation of principal and agent in any form. The Railroad Company collected the money in good faith as its own. The only relationship existing between the Railroad Company and the shippers was one of debtor and creditor. The Railroad Company claimed and demanded of the respective shippers as a matter of right certain sums for transporting their cattle. shippers paid out the charges they lost title to, or the right to demand the return of, the identical money paid to the Railroad Company. There is no possible ground for the application of the trust fund theory in this case.

The only case cited by the Circuit Court of Appeals in support of its decision in respect of the applicability of the trust fund theory to the freight charges in question and the lack of necessity for tracing the moneys into a particular fund or to specific property is its own decision in the case of Love et al. v. North American Co. et al., 229 Fed. 103. The facts in the Love case were so radically different from the facts in the instant case sought to be reviewed that it is not an authority for the decision of the Circuit Court of Appeals. The two cases are similar only in that both involve overcharges.

In the Love case the claims for the overcharges arose approximately within the six months prior to receivership; in this case the claims arose from five to seven years before the appointment of receivers.

In the Love case the overcharges were collected in defiance of a state statute; in this case the charges were collected under a lawful tariff and were the only charges that could be collected. In the Love case defendant superseded State made rates and gave bond for the return of the overcharges if the rates were upheld; in this case no statutory or Commission rates were suspended and no bond was given.

In the Love case defendant was required to keep, and did keep, in a separate account, a list of all excessive over-charges collected by it; in this case no separate fund was kept, but the charges were deposited in various banks to the credit of the Railroad Company's checking accounts.

In the Love case the rates involved were intrastate; in this case the rates involved were interstate.

In the Love case the claimants intervened as required by the interlocutory decree; in this case respondents ignored the interlocutory decree.

In the Love case the claims were presented, heard and determined while the receivers were in possession of the property of the Railroad Company; in this case the claims were not presented until more than four years after the Railway Company had come into possession of the property of the Railroad Company under foreclosure decree.

In the Love case no question relating to the interpretation of the Act to Regulate Commerce was involved; in this case the right given rests upon the Act to Regulate Commerce.

In the Love case the Oklahoma Supreme Court made the rates involved effective as of the date of the original order of the Corporation Commission of that State fixing the rates; in this case the rates to be charged were made effective on a future date, to wit, November 17, 1908.

In the Love case the rates collected were rates that the State authority had said could not be collected; in this case the rates collected were the only rates that could have been lawfully collected.

In the Love case there was no election to reduce to judgment the overcharges claimed; in this case an election to sue for damages was made and judgment in damages was obtained.

The Love case is the only case a diligent search has brought to light in which the trust fund theory is applied to a claim based on overcharges. No authorities are cited in support of the trust fund ruling, and the facts in that case are so different from the facts in this case that it cannot be treated as a precedent here.

#### III.

The trust fund theory is inconsistent with, and is abrogated by, the exclusive remedy for collection of overcharges prescribed by the Act to Regulate Commerce; and the decision of the Circuit Court of Appeals that the equitable remedy is not inconsistent with the remedy by reparation is erroneous.

In its opinion in this case, the Circuit Court of Appeals says:

"We see no reason why an action at law for money had and received bars an equitable right to enforce a trust ex maleficio after said judgment is secured, in aid thereof" (R. 719).

To this view the language used by the District Court in its opinion in this case is a complete answer (288 Fed., l. c. 630):

"Moreover, this alleged cause of action to charge the railroad company as a trustee ex maleficio of the moneys collected by it from the excessive charges is not maintainable: (1) Because it is not consistent

with and is abrogated by the Act to Regulate Commerce and by the exclusive remedies for such collections by reparation prescribed by that act; and (2) because the interveners are estopped from maintaining it by their prosecution of their inconsistent remedy by reparation under the act of Congress from 1906 to December, 1920 (Act to Regulate Commerce, §§ 8, 10 [U. S. Compiled Statutes, §§ 8572, 8574]). The theory and indispensable basis of the alleged trust is that the ownership of the moneys collected by the company from the excessive charges never passed from the interveners to the collector, but that the latter took and its successor in interest still holds those moneys in trust for the owners, the interveners. The theory and the indispensable basis for the remedy by reparation provided by the Act to Regulate Commerce is that the interveners lost the title and ownership of the moneys collected by the company, were damaged by that loss, and that those damages are to be paid by the reparation provided by Act to Regulate Commerce, §§ 8, 10 (U. S. Compiled Statutes, 66 8572, 8574)."

In Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U. S. 426, this Court, in effect, held that the remedy by reparation prescribed by the Act to Regulate Commerce for the collection of excessive charges, where, as in this case, a decision of the Interstate Commerce Commission was essential to determine the unreasonableness and the extent of the unreasonableness of the rates, was exclusive, and that no action at common law could be maintained on account thereof.

A like view was expressed in the case of Texas & Pacific Railway Co. v. Cisco Oil Mill, 204 U. S. 449.

In Keogh v. Chicago & Northwestern Railway Co. et al., 260 U. S. 156, this Court held that a shipper could not recover damages from a carrier under Section 7 of the Anti-Trust Act for the exaction of rates illegal because unreasonable, but that he was relegated to his remedy in damages under the Act to Regulate Commerce.

The claims of respondents evidenced by the judgments obtained by them against the Railroad Company in the District Court at Kansas City were based upon orders of reparation made by the Commission, a debt the amount of which had been fixed and determined by the Commission. Respondents pursued the remedy prescribed by the Act to Regulate Commerce to collect that debt. That remedy is wholly inconsistent and at variance with the remedy they now seek to pursue by a proceeding in equity to charge the collector of the excessive charges and its successor in interest as a trustee ex maleficio thereof.

In Litchfield v. Ballou, 114 U. S. 190, 194, this Court said of the trust fund theory:

"That theory discards the idea of a debt, and pursues the money into the property, and seeks the property, not as the property of the city to be sold to pay a debt, but as the property of the complainant, into which his money, not the city's, has been invested, for the reason that there was no debt created by the transaction."

In considering the trust fund theory, the Circuit Court of Appeals for the Fifth Circuit, in Butler v. Western German Bank, 159 Fed. 116, 117, said:

"The claim is for the funds or property converted or wrongfully withheld. It is not founded on the idea that the defendant owes to the complainant a debt; on the contrary, it is based on the fact that the conduct of the defendant has been such that the relation of debtor and creditor has not been created." The decision of the Circuit Court of Appeals that the equitable remedy to impress a trust in respect of over-charges is not inconsistent with the exclusive remedy by reparation prescribed by the Act to Regulate Commerce is against the great weight of authority.

#### IV.

The decision of the Circuit Court of Appeals allowing interest on respondents' claims from a date subsequent to the date of appointment of the receivers is erroneous.

By its decision (R. 722) the Circuit Court of Appeals has ordered and decreed that respondents are entitled to have their claims, in the amounts of the judgments obtained by them against the Railroad Company, with interest thereon from August 1, 1916, established as preferential claims superior to the rights of other creditors of the Railway Company, including the bondholders. Respondents' claims arose when the excessive freight charges were collected in 1908 and prior thereto. claims were primarily established by the proceedings before the Commission resulting in the orders of reparation, and finally established by the judgments rendered in the District Court at Kansas City on August 16, 1916. The receivers were appointed May 27, 1913, yet the Circuit Court of Appeals now decrees that respondents are entitled to interest on their claims from August 1, 1916, a date more than three years after the date the receivers were appointed and took charge of the property of the Railroad Company. The decision of the Court of Appeals in this respect is in conflict with the decision of this Court in Thomas v. Car Co., 149 U. S. 95, 116, wherein it is said:

"As a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the fund."

The decision of the Circuit Court is further in conflict on the question of allowance of interest with the decisions of the Circuit Court of Appeals for the Fifth Circuit in the cases of Butler v. Western German Bank, 159 Fed. 116, and Richardson v. Banking Company, 94 Fed. 442, and with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of Merchants Nat. Bank v. School District, 94 Fed. 705, 709.

Not only is the decision of the Circuit Court of Appeals erroneous in allowing interest on respondents' claims for a period subsequent to the appointment of receivers, but said decision is further erroneous in directing that such interest be allowed as a preferential claim. Interest on the excessive charges was not wrongfully collected from respondents under duress any more than were the attorneys' fees which the Court by its decision disallowed.

### V.

The decision of the Circuit Court of Appeals that respondents were entitled to have their claims allowed as preferential claims superior to the claims of other creditors, including the bond-holders, is erroneous.

If respondents' claims were a proper subject for consideration by the Court, and if respondents were entitled

to have such claims allowed at all, then, under the decisions of this Court and of other circuit courts of appeals in the cases hereinbefore cited, respondents were not entitled to have such claims allowed otherwise than as general unsecured creditors' claims against the Railroad Company. The decision of the Circuit Court of Appeals in holding that respondents were entitled to have such claims allowed as preferential claims superior to the claims of other creditors, including the bondholders, is erroneous and in conflict with said decisions hereinabove cited.

The logical opinion of Sanborn, Circuit Judge, filed in the District Court on the dismissal of respondents' intervening petitions (288 Fed. 612), completely refutes the views expressed by the Circuit Court of Appeals in its opinion in this case and the arguments relied on in support thereof, and petitioners respectfully call the attention of this Court to that opinion.

We respectfully submit that this petition should be granted and the decree reversed.

EDWARD T. MILLER,
ALEXANDER P. STEWART,
Attorneys for Petitioners.



### FILE COPY

JAN 19 1927

WM. R. STANSBURY

IN THE

### SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

ST. LOUIS AND SAN FRANCISCO RAIL-ROAD COMPANY and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Petitioners,

No. 577.

٧.

E. B. SPILLER et al.,

Respondents.

PETITIONERS' SUGGESTIONS IN OPPOSITION TO MOTION OF RESPONDENTS TO AD-VANCE ABOVE CAUSE ON DOCKET.

> EDWARD T. MILLER, ALEXANDER P. STEWART, Attorneys for Petitioners.



### IN THE

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

ST. LOUIS AND SAN FRANCISCO RAIL-ROAD COMPANY and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY.

Petitioners.

No. 577.

F. B. SPILLER et al.,

٧.

Respondents.

PETITIONERS' SUGGESTIONS IN OPPOSITION TO MOTION OF RESPONDENTS TO AD-VANCE ABOVE CAUSE ON DOCKET.

To the Honorable, the Supreme Court of the United States: Come now St. Louis and San Francisco Railroad Company and St. Louis-San Francisco Railway Company, petitioners in the above-entitled cause, and respectfully oppose the motion of respondents to advance said cause on the docket for argument, and for grounds of such opposition state:

First. That this case has never been adjudicated by this Court upon its merits, or otherwise, and is not entitled to be advanced under the provisions of paragraph 5 of rule 18 of this Court. This action was commenced on December 2, 1920, by the filing by respondents, in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, of their applications for leave to file intervening petitions in the receivership suit against St. Louis and San Francisco Railroad Company pending in said District Court (R. 14, 62). The applications were granted February 12, 1921 (R. 13, 60), and the intervening petitions were filed. Subsequent proceedings, prior to the granting by this Court of the petition for a writ of certiorari on November 1, 1926, were had in said District Court and in the United States Circuit Court of Appeals for the Eighth Circuit.

Second. The United States is not a party to this case, and therefore the case is not entitled to be advanced under the provisions of the Expediting Act (32 Stat. L. 823; 36 Stat. L. 854).

Third. The questions for determination in this case have been in litigation only since the filing by respondents of their intervening petitions in the receivership suit against St. Louis and San Francisco Railroad Company, as hereinabove stated; and no special cause exists or has been shown by respondents for advancement under paragraph 7 of rule 18 of this Court.

Wherefore, petitioners respectfully pray that the motion to advance be denied.

EDWARD T. MILLER,

ALEXANDER P. STEWART,

Attorneys for Petitioners.



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Office Supreme Court, U. S. F. I. I. E. D.

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WM. R. STANSBURY

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

No. 577.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Petitioners,

٧.

E. B. SPILLER et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

## BRIEF FOR PETITIONERS.

EDWARD T. MILLER, ALEXANDER P. STEWART, Attorneys for Petitioners.

ROBERT T. SWAINE, Of Counsel.



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## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

No. 577.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Petitioners,

٧.

E. B. SPILLER et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

### BRIEF FOR PETITIONERS.

On November 1, 1926, this Court granted a petition for a writ of certiorari directed to the United States Circuit Court of Appeals for the Eighth Circuit, to review the decree of that Court entered June 24, 1926, in the case of E. B. Spiller, et al., appellants, v. St. Louis and San Francisco Railroad Company, et al., appellees, and the cause is now before this Court for determination.

Petitioner St. Louis and San Francisco Railroad Company is hereinafter referred to as "Railroad Company",

and petitioner St. Louis-San Francisco Railway Company is hereinafter referred to as "Railway Company". The decree of the Circuit Court of Appeals reversed an order and decree entered by the District Court of the United States for the Eastern District of Missouri dismissing intervening petitions filed by respondents (hereinafter referred to as interveners) in a certain receivership proceeding in said District Court pending, entitled "North American Company, Complainant, v. St. Louis and San Francisco Railroad Company, Defendant, No. 4174, Consolidated Cause Final", whereby interveners sought to establish as preferential claims against the property of the Railroad Company, purchased on behalf of the Railway Company at foreclosure sale, certain judgments, with interest thereon, obtained by interveners against the Railroad Company in the District Court of the United States for the Western District of Missouri, based on orders of reparation made by the Interstate Commerce Commission in respect of freight charges collected by the Railroad Company from interveners for the transportation of certain interstate shipments of cattle. The decree of the Circuit Court of Appeals further remanded the proceeding to the District Court with instructions to enter judgment in favor of interveners for the amounts therein set forth, the same to be adjudged as prior in lien and superior in equity to the mortgages of the Railroad Company and directed to be enforced against the

property conveyed to the Railway Company as assignee of the purchasers at said foreclosure sale.

The validity of the reorganization of the Railroad Company is not involved in this proceeding.

I.

### OFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW.

Opinion filed in District Court August 23, 1922, on Exceptions to Report of Special Master; North American Company v. St. Louis and San Francisco Railroad Company; Spiller v. same; Spiller, et al., v. same, 288 Fed. 612, (R. 216).

Opinion of Circuit Court of Appeals filed June 24, 1926, Spiller, et al., v. St. Louis and San Francisco Railroad Company, et al., 14 Fed. (2d) 284, (R. 743).

II.

# GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

 The date of the decree of the Circuit Court of Appeals for the Eighth Circuit to be reviewed.

The opinion of the Circuit Court of Appeals and its decree reversing the decree of the District Court for the Eastern District of Missouri were filed and entered June 24, 1926 (R. pp. 743, 769).

 The specific claims advanced, and rulings made, in the Circuit Court of Appeals, which are relied upon as the basis of this Court's jurisdiction.

In the Circuit Court of Appeals appellees (petitioners here) advanced the following specific claims, upon which the Court of Appeals made the following rulings:

First: That the Railroad Company in collecting freight charges at the rates then legally in effect did not become a trustee ex maleficio.

The Court of Appeals ruled that the rates, which the Interstate Commerce Commission afterwards found to be unjust and unreasonable, were therefore unlawful, and that the Railroad Company in collecting such rates became a trustee ex maleficio (R. 762).

Second: That the trust fund doctrine could not be invoked by interveners.

The Court of Appeals ruled that interveners could invoke the trust fund doctrine even though the moneys collected could not be traced into any distinct fund or into any specific property (R. 763, 764).

Third: That the trust fund theory was inconsistent with, and abrogated by, the Act to Regulate Commerce, and by the exclusive remedies for collection by reparation prescribed by that Act.

The Court of Appeals ruled that an equitable action based on the trust fund doctrine was not inconsistent with the remedy by reparation prescribed by the Act to Regulate Commerce (R. 765).

Fourth: That interveners' claims were not preferred debts of the Railroad Company, and, if allowable at all, could only be established as general unsecured creditors' claims.

The Court of Appeals ruled that interveners were entitled to have their claims established as preferential claims superior to the rights of other creditors, including the bondholders, in the amounts of the judgments obtained by them against the Railroad Company, with interest from August 1, 1916, a date more than three years after the date of the appointment of receivers of the property of the Railroad Company on May 27, 1913 (R. 768).

Fifth: That interveners were guilty of inexcusable laches in failing to file their claims or demands in the receivership suit against the Railroad Company as required by the interlocutory decree rendered therein, and in delaying to file application for leave to file such claims until more than four years after the sale was confirmed, and that their claims were properly dismissed by the District Court.

The Court of Appeals ruled that interveners were not guilty of laches in failing to file their claims, or in such delay, and that it was error to dismiss their intervening petitions on that ground (R. 768).

Sixth: That interveners were precluded by the final decree rendered in the receivership suit against the Railroad Company and the order of confirmation of sale thereunder from asserting any claim against the Railway Company or its property.

The Court of Appeals ruled that interveners' claims arose after the entry of the final decree and that interveners were not precluded by the final decree and order of confirmation of sale from asserting said claims (R. 768).

 The statutory provision under which this Court's jurisdiction is invoked.

Section 240 (a) of the Judicial Code, as amended February 13, 1925 (Chapter 229, Sec. 1, 43 Stat. 938; Sec. 1217, U. S. Comp. Stat. Cum. Supp. 1925).

4. Cases believed to sustain the jurisdiction of this Court.

Among the cases believed to sustain the jurisdiction of this Court are the following:

> Spiller v. Atchison, Topeka and Santa Fe Railway Co., 253 U. S. 117,

> Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U. S. 184,

Schuyler v. Littlefield, 232 U. S. 707,

Keogh v. Chicago & Northwestern Railway Co., et al., 260 U. S. 156.

#### III.

### STATEMENT OF THE CASE.

In 1903 the Railroad Company advanced its freight rates on cattle shipments from the Southwest to Kansas City, Chicago and other markets, about three cents per hundredweight, filed and published the schedules of the advanced rates, and otherwise complied with the requirements of the Act to Regulate Commerce. These rates were challenged by divers parties as unreasonable and unjust, the specific challenge being by the Cattle Raisers' Association of Texas. The Interstate Commerce Commission (hereinafter called Commission) on August 16, 1905, found the rates were unjust and unreasonable to the extent of the advance of three cents per hundredweight made in 1903. (11 I. C. C. Rep. 296). The Commission made no order on this report and finding and reserved all questions of reparation. (R. 265).

After the passage of the Hepburn Act of June 29, 1906, the Commission, on petition of interveners, reopened the case. After again trying the case in full, the Commission on April 14, 1908, again pronounced the rates excessive and unreasonable (13 I. C. C. Rep. 418), and made an order prescribing rates for the future to take effect November 17, 1908, being the rates existing prior to the advance made in 1903. Questions of reparation to be allowed only from August 29, 1906, were reserved by the Commission

to be subsequently dealt with as specific claims were presented. (R. 274, 293).

Between August 29, 1906, and November 17, 1908, the Railroad Company collected from certain shippers of cattle, whose claims are held by interveners, regularly and legally established freight rates, which the Commission on April 14, 1908, found to be unreasonable and unjust to the extent of about three cents per hundredweight. Interveners presented to the Commission claims for reparation based on said excessive rates collected from August 29, 1906, to November 17, 1908, and on January 12, 1914, the Commission ordered the Railroad Company to pay to interveners sums aggregating upward of \$30,000, including interest to July 15, 1914, as reparation for damages sustained by interveners as the result of the excessive charges so collected. (R. 298, 300, 302).

On December 29, 1914, interveners filed suits against the Railroad Company in the District Court of the United States for the Western District of Missouri, at Kansas City, on the orders of reparation made by the Commission. (R. 304, 314). On August 16, 1916, interveners recovered judgments in said suits, with interest thereon from August 1, 1916, (R. 315), and such judgments were subsequently on appeal affirmed by this Court on May 17, 1920, (253 U. S. 117), the mandate of this Court being filed in the District Court on June 6, 1920. (R. 319).

On May 27, 1913, on the bill of complaint of North American Company (a general creditor), filed in the District Court of the United States for the Eastern District of Missouri, that Court appointed receivers for all of the properties of the Railroad Company for the benefit of its creditors as their interests might appear. (R. 11). The receivers took possession of and proceeded to operate all the property of the Railroad Company. On April 3, 1914, a like bill was filed by another creditor, and that suit was consolidated with the suit of North American Company. On May 29, 1914, in this consolidated cause, the District Court rendered an interlocutory decree (R. 639) to the effect that all of the property of the Railroad Company was thereby impounded, sequestered and set apart to pay the debts and obligations of the Railroad Company; that all parties who claimed any interest in or lien upon any of the property of the Railroad Company in the hands or under the control of the receivers should file verified statements of their claims with the Special Master on or before October 1, 1914, and that each of them who failed or refused so to do should, by such failure, be barred from receiving any share in the distribution of any of said funds of the property or of the proceeds thereof. Notice of this order and of the limitation of the time for the presentation of claims, in order to permit the holders thereof to derive any benefit from or share in the distribution of the property in the hands of the receivers or of its proceeds, was ordered to be and was duly given by proper publication of the order itself. (R. 641). By subsequent orders the Court extended the time for the presentation of such claims, and that time finally expired on February 1, 1916. (R. 642).

On May 22, 1914, the trustees under the general lien mortgage of the Railroad Company, dated August 27, 1907, filed bill for foreclosure. On July 9, 1914, the trustees of the Railroad Company's refunding mortgage, dated June 20, 1901, filed bill for foreclosure. The same receivers theretofore appointed were appointed in these proceedings. who immediately took possession of and impounded all the mortgaged property for the benefit of the mortgage bondholders, and by proper orders all these suits were consolidated into a single suit entitled "North American Company, Complainant, v. St. Louis and San Francisco Railroad Company, Defendant, No. 4174, Consolidated Cause Final," and the final decree of foreclosure and sale was rendered in this consolidated cause and in each of its constituent causes. Substantially all of the property of the Railroad Company was subject to the mortgages which were thereby foreclosed.

On March 31, 1916, the final decree of foreclosure and sale of all the property of the Railroad Company was rendered. (R. 590). On July 16, 1916, all this property was sold under that decree to purchasers for the Railway Company, which received and took charge of the property on or about November 1, 1916, assuming the obligations of the purchasers, and has since, except for the period of Federal control, been in possession of and operating the same. On August 29, 1916, the court confirmed the sale

after a hearing upon notice to all parties in interest. (R. 676).

The final decree (R. 590) by Article Eighteenth (R. 633, 634) made provision for a fair and timely offer of cash or participation in the new company through stocks, bonds or otherwise to all creditors of the Railroad Company who had presented their claims in accordance with the interlocutory decree, and the court reserved jurisdiction to determine whether such an offer had been made, with the right to modify the decree in case it determined that no such offer had been made. In St. Louis-San Francisco Railway Company v. McElvain, 253 Fed. 123, the court found that such offer had been made to all who had entitled themselves thereto by filing their claims as required. The order confirming the sale also finds that such offer had been made (R. 676, 679). No appeal was perfected from any of these orders or decrees in the receivership case.

Interveners did not file any verified claim to any interest in or lien upon the property or the proceeds of the property of the Railroad Company in the hands of the receivers, as required by the terms of the interlocutory decree, under the provisions of which the time for filing such claims finally expired February 1, 1916. At the hearing on the application for confirmation of the sale on August 29, 1916, interveners gave notice to the parties to the consolidated cause that they had claims against the Railroad Company for illegal freight exactions that had been re-

duced to judgment in the District Court of the United States for the Western District of Missouri on August 16, 1916, that an appeal was being taken from that judgment by the Railroad Company, and that interveners would claim that their claims evidenced by that judgment were prior in lien and superior in equity to the liens and claims of every other party whomsoever upon and to the property of the Railroad Company in the hands of the receivers. (R. 587). No other or further suggestion, presentation or action was made or taken by interveners to present or prove their claims on or to the property sold and delivered to the Railway Company as assignee of the purchasers under the foreclosure decree, or against the Railway Company, until December 2, 1920, when interveners applied to the District Court for leave to file their intervening petitions in the consolidated receivership suit.

The court granted the application for leave to file such intervening petitions on February 12, 1921, (R. 13, 61); such petitions were filed and referred to a Special Master, who, after hearing same and making extended findings of fact and conclusions of law, recommended that judgment be entered in favor of interveners for the amounts of the judgments awarded by the District Court of the United States for the Western District of Missouri, with interest thereon from August 1, 1916, and that the entire amount be adjudged as prior in lien and superior in equity to the refunding and general lien mortgages of the Railroad Company, and that it should be enforced against

the property conveyed to the Railway Company as assignee of the purchasers at the foreclosure sale. (R. 134). Exceptions to the report of the Master were filed by the Railroad Company and by the Railway Company. (R. 197, 216). The District Court overruled the conclusions of law of the Master, and ordered and adjudged that the exceptions to those parts of the report of the Master, which were contrary to and inconsistent with the views expressed by the Court in its memorandum opinion filed, should be and were sustained, and dismissed the intervening petitions of interveners. (R. 242).

It appears from the evidence before the Master (R. 329, 331), that the moneys collected by the Railroad Company from interveners between August 29, 1906, and November 17, 1908, were not kept by the Railroad Company in a separate or designated account or fund, nor were they separated from other gross receipts of the Railroad Company derived from the operation of its lines of railroad, but were deposited in banks with other moneys of the Railroad Company in its general account, and said banks had no instructions from the Railroad Company to keep said moneys in a specific fund, nor to refrain from paying the same out in the ordinary course of business on the Railroad Company's checks against its funds in said banks, nor did said banks keep said moneys in a separate account, and the Railroad Company, in payment of its ordinary current expenses, in improvements to its property, and otherwise, checked out of its deposits in each of said banks during each year from June 1, 1906, to May 27, 1913, sums of money largely in excess of the moneys so collected from interveners, and deposited in said banks during each of said years sums of money largely in excess of the amounts so collected. There was no evidence that some or all of these accounts were not from time to time completely exhausted during that period.

From the order and decree of the District Court dismissing their intervening petitions interveners appealed to the Circuit Court of Appeals, which Court on June 24, 1926, by its order and decree reversed the order and decree of the District Court and remanded the cause to the District Court with instructions to enter judgment in favor of interveners for amounts equivalent to the judgments obtained by interveners in the District Court of the United States for the Western District of Missouri, with interest thereon from August 1, 1916, the same to be adjudged as prior in lien and superior in equity to the refunding and general lien mortgages of the Railroad Company, and directed to be enforced against the property conveyed to the Railway Company as assignee of the purchasers at the foreclosure sale had in the consolidated receivership case. (R. 768, 769).

The following chronological statement of proceedings affecting this controversy before the Interstate Commerce Commission, in the District Court of the United States for the Western District of Missouri, and in the receivership suit against the Railroad Company in the District

Court of the United States for the Eastern District of Missouri, may enable the Court more readily to understand the history of this litigation:

1903—The rates complained of were lawfully established.

1904—The rates were attacked before the Commission as unjust and unreasonable.

1905—The Commission found the rates unjust and unreasonable.

June, 1906—The Commission was given power to prescribe rates.

November, 1906—The Commission set the proceedings for further hearing.

April, 1908—The Commission reaffirmed its decision of 1905.

May, 1913—Receivers were appointed on a bill alleging the Railroad Company's insolvency.

January, 1914—The Commission ordered reparation, and claim was made on the Railroad Company for payment in accordance therewith.

May, 1914—Foreclosure proceedings were instituted in the receivership case against the Railroad Company.

May, 1914—An interlocutory decree was entered in the receivership case wherein, among other things, the Court ordered, adjudged and decreed that the holders of any claim, claims or demands or obligations of or against the Railroad Company, and all persons claiming any interest in or lien upon any of the funds or property in the

hands of the receivers as creditors of the Railroad Company or in any other way, should file their respective claims, demands and obligations with the Special Master by October 1, 1914, and failing so to do they should be barred as provided in the decree. The time for filing claims was subsequently extended from time to time, finally expiring February 1, 1916. Due notice by publication of the foregoing provision of the interlocutory decree was given as required by the decree.

December, 1914—Interveners filed suit against the Railroad Company for damages in the District Court at Kansas City based on the orders of reparation made by the Commission.

March, 1916—A final decree was entered in the receiver-ship case, Article Ninth of which directed the payment of unpaid claims of creditors of the Railroad Company "which have been or shall be admitted by the parties in interest or adjudged by this Court to be" preferential. Article Tenth of the final decree adjudged that due notice having been given for the presentation in the receiver-ship case of claims and demands against the Railroad Company of every character and description whatsoever, no such claim or demand which had not been presented in accordance with the terms of the interlocutory decree, except a deficiency judgment and claims or demands arising after the entry of the decree, should be enforceable against the receivers, the property sold, or any part there-

of, any purchaser of the same, or entitled to share in the distribution of the proceeds of the sale.

July 16, 1916—The property of the Railroad Company was sold under the final decree.

August, 1916—Judgment for the amounts of reparation ordered by the Commission was obtained by interveners in the District Court at Kansas City.

August 28, 1916—The Railroad Company appealed from said judgment to the Circuit Court of Appeals.

August 29, 1916—An order confirming the sale of the Railroad Company's property was entered, the sale being made final and absolute, subject to the terms and conditions of the final decree and to all the reservations to the purchasers and to their assigns and to the court in the final decree contained.

November 1, 1916—The Railway Company took possession as assignee of the purchasers at foreclosure sale of the property of the Railroad Company.

October, 1917—The Circuit Court of Appeals reversed the judgment obtained by interveners against the Railroad Company in the District Court for the Western District of Missouri, and interveners appealed therefrom to this Court.

January 29, 1918—The receivers were discharged.

June, 1920—This Court reversed the judgment of the Circuit Court of Appeals and affirmed the judgment of the District Court for the Western District of Missouri in favor of interveners and against the Railroad Company.

December 2, 1920—Interveners filed their application for leave to file intervening petitions in the receivership suit against the Railroad Company in the District Court for the Eastern District of Missouri.

February 12, 1921—Leave to file such intervening petitions was granted.

August 23, 1922—The intervening petitions were dismissed by the District Court, and interveners appealed to the Circuit Court of Appeals.

June 24, 1926—The Circuit Court of Appeals reversed the order and decree of the District Court dismissing interveners' petitions, and remanded the cause to the District Court with instructions to enter judgment in favor of interveners for amounts euqivalent to the judgments obtained by them against the Railroad Company in the District Court for the Western District of Missouri, with interest thereon from August 1, 1916, the same to be adjudged as prior in lien and superior in equity to the refunding and general lien mortgages of the Railroad Company, and directed to be enforced against the property conveyed to the Railway Company as assignee of the purchasers at the foreclosure sale had in the consolidated receivership case.

November 1, 1926—This Court granted petition for writ of certiorari to review said decree of the Circuit Court of Appeals.

As above stated, the time for presentation of claims in the receivership suit against the Railroad Company finally expired on February 1, 1916. The final decree in that case expressly adjudged the claims of all who had neither intervened nor filed verified claims foreclosed and barred from participation in the benefits of the property or its proceeds as against all parties claiming under that decree. On July 16, 1916, in reliance upon the interlocutory and final decrees, all the property of the Railroad Company was purchased for the Railway Company at the foreclosure sale. Then and thereby the court contracted to convey that property to the purchaser for the purchase price bid therefor, free from the claims of interveners, as the court had decreed that it was, and the purchaser contracted to pay the purchase price bid therefor. The court and the purchaser performed this contract. On August 29, 1916, the court confirmed the sale. A few days later it caused the property to be conveyed to the purchaser. The purchaser paid the price it had bid for it, issued its stocks and bonds to the amount of millions of dollars, and immediately placed them upon the market, so that many of them must have gone into the hands of innocent purchasers long before interveners on December 2, 1920, applied for leave to file their intervening petitions.

Numerous holders of reparation claims against the Railroad Company pending undetermined before the Interstate Commerce Commission filed their claims with the Special Master pursuant to the terms of the interlocutory decree, and they were allowed as general creditors' claims in such sum, if any, as the Interstate Commerce Commission should order reparation, and if reparation was denied the order provided that such claims should be disallowed and dismissed. Interveners made no effort to file heir claims as required by the interlocutory decree, and a hough the claims arose prior to November, 1908, and although the amounts were definitely established before the Interstate Commerce Commission early in 1914, and although they were reduced to judgment in the District Court for the Western District of Missouri in August, 1916, yet not until December, 1920, long after the issuance of bonds by the Railway Company in 1916, and long after the contract made by the Court with the Railway Company, contained in the terms of the final decree and in the order confirming the sale, did interveners make any effort to file their claims herein.

#### IV.

### SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

- 1. The Circuit Court of Appeals erred in holding that collection of regularly established tariff rates was unlawful because such rates were afterwards found to be unjust and unreasonable.
- 2. The Circuit Court of Appeals erred in holding that the Railroad Company became chargeable as trustee ex maleficio in respect of the excessive charges collected.

- 3. The Circuit Court of Appeals erred in holding that the trust fund doctrine could be successfully invoked by interveners.
- 4. The Circuit Court of Appeals erred in holding that an equitable action to charge the Railroad Company as trustee ex maleficio was not inconsistent with the remedy by reparation prescribed by the Act to Regulate Commerce.
- 5. The Circuit Court of Appeals erred in holding that interveners were entitled to have their claims allowed as preferential claims superior to the claims of other creditors, including the bondholders, in the amounts of the judgm nts obtained by them against the Railroad Company.
- 6. The Circuit Court of Appeals erred in holding that interveners were entitled to interest on the amount of their claims (judgments) from August 1, 1916.
- 7. The Circuit Court of Appeals erred in holding that interveners were not guilty of laches in failing to file their claims as required by the interlocutory decree, or in delaying to file application for leave to file such claims until more than four years after the sale was confirmed, and that it was error to dism's the intervening petitions on that ground.
- 8. The Circuit Court of Appeals erred in holding that interveners' claims arose after the entry of the final decree and were not barred, and that interveners were not precluded by the final decree and order of confirmation of sale from asserting said claims.

### ARGUMENT.

T.

The decision of the Circuit Court of Appeals that the collection of legally established rates becomes wrongful and unlawful, because such rates are subsequently found by the Commission to be unjust and unreasonable, is erroneous and is in conflict with applicable decisions of this Court.

The charges which form the basis of respondents' claims were collected by the Railroad Company between August 29, 1906, and November 17, 1908. On April 14, 1908, the Commission found the rates to be unjust and unreasonable, and made an order prescribing rates for the future, to take effect November 17, 1908. On January 12, 1914, the Commission made an order of reparation in respect of the excessive charges collected by the Railroad Company during the period mentioned.

The rates collected by the Railroad Company were the lawful tariff rates in effect at the time, and were the only rates the Railroad Company was lawfully authorized to charge and collect, and the Railroad Company was under an absolute obligation to collect the published rates, whether reasonable or unreasonable, discriminatory or nondiscriminatory.

In Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 437, this Court held:

"The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the act and the punishments which it imposed were directed not only against carriers but against shippers, or any person who, directly or indirectly, by any machination or device, in any manner whatsoever, accomplished the result of producing the wrongful discriminations or preferences which the act forbade."

In Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U. S. 184, 197, this Court said:

"The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged too much and then make a corresponding rebate, nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper (February 4, 1887, 24 Stat. 379, c. 104, §2; March 2, 1889, 25 Stat. 855, c. 382, §6; Armour Co. v. United States, 209 U. S. 56, 83). The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a

statute, binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation.

"In view of this imperative obligation to charge, collect and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid."

In Robinson v. Baltimore and Ohio Railroad Co., 222 U. S. 506, 508, it was said:

"The act (to Regulate Commerce), whilst prohibiting unreasonable charges, unjust discriminations and undue preferences by carriers subject to its provisions, also prescribed the manner in which that prohibition should be enforced; that is to say, the act laid upon every such carrier the duty of publishing and filing, in a prescribed mode, schedules of the rates to be charged for the transportation of property over its road, declared that the rates named in schedules so established should be conclusively deemed to be the legal rates until changed as provided in the act, forbade any deviation from them while they remained in effect."

No order was, or could have been, entered by the Commission in August, 1905, requiring the Railroad Company to cease and desist from collecting the rates held to be unreasonable for the future, as the Commission did not at that time have power to prescribe rates for the future. It was merely the conclusion of the Commission that the rates then in effect were unjust and unreasonable (11 I. C. C. Rep. 296, 352).

The language used by Sanborn, Circuit Judge, in his opinion filed in the District Court on dismissing the intervening petitions of respondents, is peculiarly apt (288 Fed. 612, 629-630):

"The railroad company collected these legally established rates. It had the decision and direction of the highest judicial tribunal in the land for its justification, and this Court is of the opinion that its collection of these rates was not unlawful. The prohibition of section 1 and that of section 6 must be read and interpreted together, and the correct construction of them is that the specific prohibition of section 6 constitutes an exception from the general prohibition of section 1. A construction that each prohibition is of equal force and equally applicable in such a case as that in hand would impose upon the carrier a penalty of a violation of section 1 if it complied with section 6, and the penalty of a violation of section 6 if it complied with section 1, and an interpretation which leads to such an absurdity ought to be rejected."

The decision of the Circuit Court of Appeals is not only in conflict with the controlling decisions of this Court hereinabove cited, but is further in conflict with the prior decision of the same Court of Appeals in the case of Chicago, B. & Q. R. R. Co. v. Merriam & Millard Co., 297 Fed. 1, 3, wherein it was said:

"The claim that the rate was unlawful cannot be sustained. The duly filed and published tariff rate, while it was in force, was the only lawful rate.

\* • • It is not claimed that the carrier had made any change of these tariff rates at the time of these shipments. The report and opinion of the Commission filed on October 20, 1921, did not purport to and could not annul or change the existing tariff rate.

\* • • • Section 15 of the Interstate Commerce Act required that any change of the rates made by the Commission should be made, not by a report, finding or opinion, but by an order to the carrier to cease and desist from collection of the rate, to take effect not less than thirty days after the date of the order."

In support of its decision in the Merriam & Millard case the Circuit Court of Appeals cited and relied upon the decision of the District Court (288 Fed. 612) in the case now under review; yet the same Court of Appeals, without reference to its prior decision in the Merriam & Millard case, overruled the decision of the District Court in the instant case on which the decision of the Merriam & Millard case was founded.

The decision of the Circuit Court of Appeals that the Railroad Company became chargeable as trustee ex maleficio of the excessive charges collected by it, and that the trust-fund doctrine could be invoked by respondents, is erroneous and in conflict with the decisions of this Court, with other decisions of the same Circuit Court of Appeals, and with the decisions of other Circuit Courts of Appeals, on the same matter.

The Circuit Court of Appeals held, that the excessive charges were wrongfully and unlawfully collected by the Railroad Company, that the Railroad Company thereby became chargeable as a trustee ex maleficio, that the trustfund theory could be invoked by respondents to make their claims preferential and to give them priority, notwithstanding the moneys collected from respondents could not be and were not traced into a specific fund or into specific property which came into the hands of the receivers, and that it was not necessary so to trace such moneys.

The Railroad Company in collecting the charges, subsequently found by the Commission to be excessive, did not become a trustee ex maleficio:

First. The tariff rates were collected by the Railroad Company from respondents and were the only lawful rates that could have been collected.

Second. There was no evidence, presumptive or otherwise, that the sums collected by the Railroad Company

were retained by it and passed into the hands of the receivers, nor was there any evidence identifying the proceeds of the alleged trust fund or tracing the same, either in their original form or in other funds or property, in the hands of the receivers or the purchaser at the foreclosure sale.

There can be no fraud, actual or constructive, in which a trust ex maleficio must have its origin, where the Railroad Company collected the only charges permissible under the law, and where it would have been penalized had it attempted to collect, or had collected, charges other than those designated in the tariffs.

There is no evidence in the record warranting the application of the trust-fund theory. By stipulation (R. 329, 330, 331) it was agreed that during each of the years from 1906 to 1913 the Railroad Company expended large sums of money for improvements, equipment, interest payments and current expenses incurred in the ordinary operation of its property; that during each of said years the Railroad Company had in cash on hand an amount of money in excess of respondents' claims; that during the period of the receivership, the receivers paid under court orders large sums of money for improvements, betterments, equipment, interest, and current expenses of operation.

It is further agreed in the stipulation:

"That the alleged overcharges constituting interveners' demands were not kept by defendant (the Railroad Company) in a separate or designated ac-

count or fund, nor were they separated from other gross receipts of defendant derived from the operation of its lines of railroad; that said moneys so collected by defendant were deposited in banks with other moneys of defendant in defendant's general account, and said banks had no instructions from defendant to keep said moneys in a specified fund or to refrain from paying same out in the ordinary course of business on defendant's checks against its funds in said banks, nor did said banks keep said moneys in a separate account, and that defendant checked out of its deposits in each of said banks during each year from June 1, 1906, to May 27, 1913, sums of money largely in excess of said alleged overcharges, and deposited in said banks during each of said years sums of money largely in excess of said alleged overcharges."

The receivers on their appointment took possession of approximately \$334,000, the property of the Railroad Company. (R. 331, 332). In view of the admitted facts there can be no reasonable presumption indulged that any portion of the moneys collected by the Railroad Company prior to November, 1908, entered into this sum. The logical presumption is that all the moneys collected by the Railroad Company from interveners from 1906 to 1908 were paid out by the Railroad Company years before the receivership, and the presumption is just as weighty that they were paid in current expenses of operation as that they were paid for the benefit of the bondholders.

That these moneys were expended by the Railroad Company long prior to the receivership does not have to rest upon presumption, because in the notice addressed by respondents to Henry W. Taft, attorney for the reorganization Committee and the St. Louis & San Francisco Railway Company, dated August 29, 1916, when the application for the confirmation of the sale was under consideration by the court, it was expressly stated that the sums so collected by the Railroad Company were "used by said Company in the same manner as other freight charges collected." (R. 587, 588).

The first bi-monthly report of the receivers shows that they collected during the period May 27, 1913, to June 30, 1913, on business accrued prior to their appointment, \$2,245,153.79, and paid on business accrued prior to their appointment, \$3,985,121.02. (R. 565). They also paid prior to February 18, 1914, preferred claims against the Railroad Company aggregating \$2,229,950.47. (R. 664). The first and only notice served by respondents of their intention to establish their claims as preferential was given in August, 1916. These facts do not justify any presumption that the receivers retained any of the moneys that they received from the Railroad Company in a separate fund, or as trustees, when they had no knowledge of the assertion of any preference by respondents.

Respondents' intervening petitions were filed in February, 1921. The Railway Company took possession as assignee of the purchasers of the property of the Railroad

Company November 1, 1916, and has continued, except for Federal control, to operate the property since that date. There is no evidence in the record concerning the amount of money in the treasury of the Railway Company during that period, and the trust-fund doctrine would fail for that reason, if for no other.

The Circuit Court of Appeals conceded (R. 763) that the moneys collected from respondents were commingled with other funds and could not be traced into any separate or distinct fund in the hands of the receivers; but held that, in order to establish a trust in a railroad company for the benefit of the shipper as to freight charges wrongfully exacted, it is not necessary to show that the identical money received has been placed in a separate account or to trace the identical fund. In so holding, the decision of the Circuit Court of Appeals is in conflict with the rule as established by the decisions of this Court and of other Circuit Courts of Appeals.

The proceeds of a trust fund or property wrongfully converted by a trustee can be followed by the cestui que trust and the trust impressed thereon as against the trustee only so long as they can be identified and traced either in their original form or in other funds or property, in the hands of the trustee, and where this cannot be done the cestui que trust is not entitled to follow such proceeds into the hand of the trustee or his representative and claim a lien thereon, but is entitled only to come in as one of the general creditors of the trustee.

In Litchfield v. Ballou, 114 U. S. 190, 195, this Court said:

"If the complainants are after the money they let the city have, they must clearly identify the money, or the fund, or other property which represents that money, in such a manner that it can be reclaimed and delivered without taking other property with it, or injuring other persons or interfering with others' rights."

See also, Schuyler v. Littlefield, 232 U.S. 707.

The decision of the Circuit Court of Appeals is clearly in conflict with the above decisions of this Court. That decision is further in conflict with the previous decisions of the same Circuit Court of Appeals in the following cases:

Empire State Surety Co. v. Carroll County, 194 Fed. 593, wherein the fifth syllabus reads:

"It is indispensable to the maintenance by a cestui que trust of a claim to preferential payment out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver."

State Bank of Winfield v. Alva Security Bank, 232 Fed. 847, 849, wherein it was said:

"The capital defect, however, of plaintiffs' theory is their treatment of the grand division of the bank's

assets in its reports known as 'Cash and Sight Exchange' as a 'fund' within the law relating to the following of trust funds. To adopt that theory is to reestablish under a mere bookkeeping disguise the exploded notion that a trust fund may be recovered if it can be traced into the general assets of an insolvent estate. The courts have shown a tendency to restrict the 'trust fund' doctrine (Empire State Surety Co. v. Carroll County, 195 Fed. 593, 114 C. C. A. 435; Board of Commissioners v. Strawn, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. (n. s.) 1100; In re Brown, 193 Fed. 24; Commercial National Bank v. Armstrong (C. C.), 39 Fed. 684). The rule is accurately stated and numerous authorities cited by this Court in the first case referred to, \* \* "."

Also, Central State Bank v. McFarlin, 257 Fed. 535, and Scullin Steel Co. v. North American Co., 255 Fed. 945.

The decision of the Circuit Court of Appeals in the instant case is further in conflict with the subsequent decision of the same Court in the case of Farmers' National Bank, et al., v. Pribble, 15 Fed. (2d) 175, wherein, after again affirming the doctrine as announced in its prior decisions in the Carroll County, Bank of Winfield, McFarlin and Steel Company cases, supra, and other decisions of the same Court, notably Mechanics & Metals National Bank v. Buchanan, 12 Fed. (2d) 891, the Court said, at page 176:

"The doctrine that a cestui que trust, whose property had helped to swell the general assets of a cor-

poration which was or became insolvent, has a prior right to or interest in those general assets, without specific identification and tracing of such claimant's property, was again expressly repudiated by this court in the case last cited."

It may be noted in passing that the author of the opinion of the Circuit Court of Appeals, and one of the concurring Judges therein, in the instant case concurred in the opinion and holding of the same Court in the Pribble case.

Said decision is further in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of Weideman v. Newton Arms Co., 271 Fed. 302, 304, wherein it was said:

"But even if the trust relation be established, if the trustee is in bankruptcy or insolvency, it is absolutely necessary to trace the money covered by the trust into some particular property or fund. It is just as necessary to trace as it is to prove the trust relation. There is no pretense of tracing this money into the receiver's hands in any other sense than that the money was spent in carrying on a business or procuring certain articles of machinery and the like, which ultimately passed into the receiver's hands. This is not enough; cash is never traced merely by showing that it went into a general estate. subject we have recently treated in Re Bolongnesi, 254 Fed. 770, 166 C. C. A. 216; Re Matthews, 238 Fed. 785, 151 C. C. A. 635, and Re Jarmulowsky, 261 Fed. 779."

Said decision is further in conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit in the cases of Titlow v. McCormick, 236 Fed. 209, and United States National Bank of Centralia v. City of Centralia, 240 Fed. 93.

The application of the doctrine stated in the foregoing cases shows the futility of an effort to establish a trust fund in respect of respondents' claims.

In the Carroll County case, supra, at page 605, it is held:

"Where a trustee has mingled in a common fund the moneys of many separate cestuis que trustent and then made payments out of this common fund, the legal presumption is that the moneys were paid out in the order in which they were paid in, and the cestuis que trustent are equitably entitled to any allowable preference in the inverse order of the times of their respective payments into the fund."

At page 608 is the following:

"It is indispensable to a preferential payment that these amounts should be traced by adequate proof into some specific fund or property which came to the receiver's possession."

The moneys collected by the Railroad Company as overcharges between 1906 and 1908 were deposited in different banks and commingled with other moneys of the Railroad Company in those banks. The banks

had no instructions to keep the overcharge money in a specific fund, nor to refrain from paying it out in the ordinary course of business on the Railroad Company's checks, nor did the banks keep the overcharge money in separate accounts, and the Railroad Company checked out of its deposits in each of the banks sums of money largely in excess of the overcharges. The record facts, therefore, bring this case directly within the Litchfield, Carroll County and Weideman cases, supra.

Ther was no fraud, either actual or constructive, committed by the Railroad Company in this case. There was no fiduciary relation between the Railroad Company and the shippers, and no relation of principal and agent in any form. The Railroad Company collected the money in good faith as its own. The only relationship existing between the Railroad Company and the shippers was one of debtor and creditor. The Railroad Company claimed and demanded of the respective shippers as a matter of right certain sums for transporting their cattle. When the shippers paid out the charges they lost title to, or the right to demand the return of, the identical money paid to the Railroad Company. The title to the freight charges passed to the Railroad Company at the time of collection, leaving to the shippers claims for damages to be presented and prosecuted under the provisions of the Interstate Commerce Act. In collecting the tariff rates which were in effect at the time, the Railroad Company collected the only rates which it could lawfully have collected.

trust arose, if at all, at the time of the alleged illegal act. Every constructive trust must arise at the occurrence of the fact which creates it. 39 Cyc. 176; Grone v. Case, 192 Pa. State, l. c. 331; McDonald v. Andrews, 40 Pa. State Sup., l. c. 151; Wheeler v. Reynolds, 66 N. Y. 233.

The character and nature of the act, whether legal or illegal, is fixed when it occurs. There is no possible ground for the application of the trust-fund theory in this case.

#### III.

The trust-fund theory is inconsistent with, and is abrogated by, the exclusive remedy for collection of overcharges prescribed by the Act to Regulate Commerce; and the decision of the Circuit Court of Appeals that the equitable remedy is not inconsistent with the remedy by reparation is erroneous.

The theory of the intervening petitions filed by respondents in the receivership case against the Railroad Company is that the Railroad Company became indebted to respondents for certain amounts in damages, and that the judgments therefor obtained in the District Court at Kansas City are entitled to preference over the lien of the Railroad Company's mortgages. The indebtedness throughout the petitions is referred to as "damages." The inconsistency between the remedy by reparation first pursued by respondents and the equitable remedy now sought

to be pursued by them is apparent from the theory of the intervening petitions themselves.

In its opinion in this case, the Circuit Court of Appeals says:

"We see no reason why an action at law for money had and received bars an equitable right to enforce a trust ex maleficio after said judgment is secured, in aid thereof." (R. 765).

To this view the language used by Sanborn, Circuit Judge, sitting in the District Court, in the opinion on exceptions to the report of the Special Master in favor of interveners (respondents), is a complete answer (288 Fed., l. c. 630):

"Moreover, this alleged cause of action to charge the railroad company as a trustee ex maleficio of the moneys collected by it from the excessive charges is not maintainable (1) Because it is not consistent with and is abrogated by the Act to Regulate Commerce and by the exclusive remedies for such collections by reparation prescribed by that act; and (2) because the interveners are estopped from maintaining it by their prosecution of their inconsistent remedy by reparation under the act of Congress from 1906 to December, 1920 (Act to Regulate Commerce, §§ 8, 10 [U. S. Compiled Statutes §§ 8572, 8574]). The theory and indispensable basis of the alleged trust is that the ownership of the moneys collected by the company from the excessive charges never passed from the interveners to the collector, but that the latter took and its successor in interest still holds those moneys in trust for the owners, the interveners. The theory and the indispensable basis for the remedy by reparation provided by the Act to Regulate Commerce is that the interveners lost the title and ownership of the moneys collected by the company, were damaged by that loss, and that those damages are to be paid by the reparation provided by Act to Regulate Commerce, §§ 8, 10 (U. S. Compiled Statutes, §§ 8572, 8577)."

In Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U. S. 426, this Court, in effect, held that the remedy by reparation prescribed by the Act to Regulate Commerce for the collection of excessive charges, where, as in this case, a decision of the Interstate Commerce Commission was essential to determine the unreasonableness and the extent of the unreasonableness of the rates, was exclusive, and that no action at common law could be maintained on account thereof. A like view was expressed in the case of Texas & Pacific Railway Co. v. Cisco Oil Mill, 204 U. S. 449.

In Keogh v. Chicago & Northwestern Railway Co. et al., 260 U. S. 156, this Court held that a shipper could not recover damages from a carrier under Section 7 of the Anti-Trust Act for the exaction of rates illegal because unreasonable, but that he was relegated to his remedy in damages under the Act to Regulate Commerce.

The claims of respondents evidenced by the judgments obtained by them against the Railroad Company in the

District Court at Kansas City were based upon orders of reparation made by the Commission, a debt the amount of which had been determined and fixed by the Commission. Respondents pursued the remedy prescribed by the Act to Regulate Commerce to collect that debt. That remedy is wholly inconsistent and at variance with the remedy they how seek to pursue by a proceeding in equity to charge the collector of the excessive charges and its successor in interest as a trustee ex maleficio thereof.

In Litchfield v. Ballou, 114 U. S. 190, 194, this Court said of the trust fund theory:

"That theory discards the idea of a debt, and pursues the money into the property, and seeks the property, not as the property of the city to be sold to pay a debt, but as the property of the complainant, into which his money, not the city's, has been invested, for the reason that there was no debt created by the transaction."

In considering the trust fund theory, the Circuit Court of Appeals for the Fifth Circuit, in Butler v. Western German Bank, 159 Fed. 116, 117, said:

"The claim is for the funds or property converted or wrongfully withheld. It is not founded on the idea that the defendant owes to the complainant a debt; on the contrary, it is based on the fact that the conduct of the defendant has been such that the relation of debtor and creditor has not been created."

The judgments covered by respondents' interventions are based upon awards of reparation made by the Commission. The common law right, if any, existing for recovery of damages sustained as the result of charging unreasonable freight rates, was abrogated by the passage of the Act to Regulate Commerce. Abilene Cotton Oil Co. and Cisco Oil Mill cases, supra. Hence, the terms of that Act must be looked to to determine the nature or character of a suit upon an award of reparation.

Section 16 of the Act to Regulate Commerce provides that if, after a hearing on a complaint made as provided in Section 13 of the Act, the Commission determines that any party complainant is entitled to an award of damages under the provisions of the Act for violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named; that if the carrier does not comply with an order for the payment of money within the time limit in such order, the complainant may file in the District Court of the United States, or in any State Court having jurisdiction, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises, and that such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated. Said Section also provides that all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues.

Respondents' judgments obtained in the District Court at Kansas City represent ordinary money demands against the Railroad Company for acts which, though lawful when committed, assume the nature of a tort because of a subsequent decision of the Commission holding the tariff rates to be unreasonable. The rates were collected from five to seven years prior to the appointment of the receivers. The status of respondents, if their claims could be considered, would be that of general unsecured creditors, with no right to priority over the bondholders either as to the income or the corpus of the estate, upon the trust-fund theory, or upon any other theory.

In Naylor & Co. v. Lehigh Valley R. Co. et al., 188 Fed. 860, it was held that a suit to enforce an order of reparation awarded by the Commission is one sounding in tort for damages.

In Southern Pacific Co. v. Goldfield Con. M. & T. Co., 220 Fed. 14, the Circuit Court of Appeals for the Ninth Circuit, in speaking of the nature of a suit filed to enforce an award of reparation by the Commission, said, at page 594:

"It is entirely true that the reparation awarded the defendant in error by the Interstate Commerce Commission was not a penalty, but could only be recovered by it as damages growing out of the excess of charge by the carrier companies, and that in the event of the refusal of the latter to pay such damages an action at law was essential for the recovery thereof, which action, according to the express provision of section 5 of the amendatory act of June 29, 1906 (34 Stat. 590, c. 3591). is required to 'proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated'."

An analysis of the various provisions of the Act to Regulate Commerce shows that what is authorized is merely an action at law for damages sustained as the result of the violation of its terms.

In Spiller v. Atchison etc. R. Co., 253 U. S. 117, this Court, in holding that a claim for reparation is assignable, and in construing several sections of the Act, said, at pages 134 and 135:

"Section 8 (24 Stat. 382) makes the common carrier, for anything done contrary to the prohibition of the act, 'liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act.' Section 9 entitles any person claiming to be damaged either to make complaint to the Commission or to 'bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable.' Section 16 as amended (34 Stat. 590) provides that where an award of damages is made by the Commission and

the carrier does not comply with the order, 'the complainant, or any person for whose benefit such order was made' may bring suit. • • • A claim for damages sustained through the exaction of unreasonable charges for the carriage of freight, is a claim not for a penalty but for compensation."

The decision of the Circuit Court of Appeals, that the equitable remedy to impress a trust in respect of overcharges is not inconsistent with the exclusive remedy by reparation prescribed by the Act to Regulate Commerce, is against the doctrine as announced by the above cited decisions of this Court.

#### IV.

Overcharges collected by the Railroad Company from five to seven years prior to the appointment of the receivers are not preferred debts of the Railroad Company.

The proposition that overcharges collected by the Railroad Company from five to seven years prior to the appointment of receivers of its property are not preferred debts of the Railroad Company is so completely covered in the opinion of Sanborn, Circuit Judge, in this case (288 Fed., l. c. 631, 632), and by the cases cited by him in support thereof, that it is deemed unnecessary to analyze or quote from the cases.

The general rule is announced in Illinois Trust & Savings Bank v. Doud, 105 Fed. 123, as follows:

"The test of the preferential equity of a claim is its consideration. If its consideration was a current expense of the ordinary operation of the property of the mortgagor incurred in the usual course of its business, for labor, supplies and like things, necessary for the operation of the railroad, within a limited time, usually not exceeding six months anterior to the appointment of the receiver, the claim may be preferred in payment, otherwise it may not be."

The only case cited by the Circuit Court of Appeals in support of its decision in respect of the applicability of the trust-fund theory to the freight charges in question and in respect of respondents' right to preference in payment of their alleged claims is its own decision in the case of Love v. North American Co., 229 Fed. 103. The facts in the Love case were so radically different from the facts now under review as to destroy the Love case as authority for the decision of the Circuit Court of Appeals in the instant case.

The one fact alone that in the Love case state-made rates were superseded under the requirements that a bond be given for the return of the excess over the state rates if such excess was held illegal, and that the Railroad Company keep in a separate account a list of all excess charges collected by it, is of itself sufficient to distinguish the Love case from this case.

The opinion in the Love case is directly opposite to the opinion of the same Circuit Court of Appeals in Chicago & Alton R. R. Co. v. Trust Co., 225 Fed. 940, which involved a claim composed in part of overcharges. At page 944 the Court used this language:

"They cite no act of Congress, however, and no decision of any court, that a mortgagor railway company which, as a common carrier, or a common carrier which, as a connecting carrier therewith, or both together, may, by failing to pay their debts to each other, or by overcharging shippers, or by any other wrongful act, deprive bondholders of the mortgagor company of their prior lien, or impose upon them penalties for the wrongdoing of the carriers."

In all of the cases where debts of a railroad company arising within the six months period have been allowed as preferential, such allowance has been based upon the fact that the debt incurred was in the interest and to the ad-There is neither evidence vantage of the bondholders. nor presumption in this case that these charges collected prior to November, 1908, were expended in the interest of the bondholders. There is no evidence in this case that these charges were diverted from the payment of the current expenses for the ordinary operation of the railroad to the payment of interest on bonded indebtedness, or otherwise applied to benefit bondholders. The stipulation in this case, hereinabove referred to (R., p. 329), shows sums were expended by the Railroad Company and by the receivers both in the interest of bondholders and for current expenses. There is neither evidence nor presumption that out of the sums so expended the overcharges collected from respondents were paid for the interest of bondholders rather than for current expenses. If \$50,000 were collected from respondents and \$100,000 were expended in payment of interest and current expenses, of which \$50,000 went to interest and \$50,000 went to current expenses, there is no presumption that respondents' \$50,000 went to interest rather than to current expenses. In other words there is no evidence in this case of diversion of income received from respondents to the benefit of the bondholders, and, as shown by the cases above cited and quoted from, this is the very foundation upon which respondents' claims for preference rest.

## V.

The decision of the Circuit Court of Appeals allowing interest on respondents' claims from a date subsequent to the date of appointment of the receivers is erroneous.

By its decision the Circuit Court of Appeals has ordered and decreed that respondents are entitled to have their claims, in the amounts of the judgments obtained by them against the Railroad Company, with interest thereon from August 1, 1916, established as preferential claims superior to the rights of other creditors of the Railway Company, including the bondholders. Respondents' claims arose when the excessive freight charges were collected in 1908 and prior thereto. These claims were primarily established by the proceedings before the Commission resulting in the orders of reparation, and finally established by the judgments rendered in the District Court at Kansas City on August 16, 1916. The receivers were appointed May 27, 1913, yet the Circuit Court of Appeals now decrees that respondents are entitled to interest on their claims from August 1, 1916, a date more than three years after the date the receivers were appointed and took charge of the property of the Railroad Company. The decision of the Court of Appeals in this respect is in conflict with the decision of this Court in Thomas v. Car Co., 149 U. S. 95, 116, wherein it is said:

"As a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the fund."

The decision of the Circuit Court of Appeals is further in conflict on the question of allowance of interest with the decisions of the Circuit Court of Appeals for the Fifth Circuit in the cases of Butler v. Western German Bank, 159 Fed. 116, and Richardson v. Banking Company, 94 Fed. 442, and with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of Merchants Nat. Bank v. School District, 94 Fed. 705, 709.

Not only is the decision of the Circuit Court of Appeals erroneous in allowing interest on respondents' claims for a period subsequent to the appointment of receivers, but said decision is further erroneous in directing that such interest be allowed as a preferential claim. Interest on the excessive charges was not wrongfully collected from respondents under duress any more than were the attorneys' fees which the Circuit Court of Appeals by its decision disallowed.

## VI.

The decision of the Circuit Court of Appeals that respondents were not guilty of laches in failing to file their claims as required by the interlocutory decree in the receivership case, or in delaying to file application for leave to file such claims until more than four years after the sale was confirmed, and that it was error to dismiss their intervening petitions on that ground, is erroneous.

Respondents are asserting their claims under the final decree in the receivership case. (Intervening petitions, R. 15 and 62). One who intervenes in an equity suit enters subject to, and is bound and estopped by, all previous orders, decrees and acts of the court therein to the

same extent as if he had been a party to such suit when such orders, decrees and acts were made.

Swift v. Gas Co., 244 Fed. 20.

Among the orders, decrees and acts of the court in the receivership case by which respondents were bound, at the time of filing their interventions, and the integrity of which they are estopped to deny, are the interlocutory decree (R. 639), the final decree (R. 590), the order confirming sale (R. 676), and the order discharging the receivers (R. 581). Respondents ignored every order, decree and act of the court, except the order permitting the filing of their interventions.

It was necessary that respondents establish their claims before the Interstate Commerce Commission before the same could be finally allowed in the receivership case, but it was not necessary that they establish their claims, and afterward obtain a judgment for damages against the Railroad Company in another court and prosecute such judgment to a finality through the appellate courts, before presenting their claims or demands in the receivership case. Their claims, although finally reduced to judgment in August, 1916, arose in November, 1908, and prior thereto, the liability of the Railroad Company therefor was declared long prior to 1914, and the definite amount of such liability was established by reparation orders of the Commission in January, 1914. Respondents were then the holders of "claims, demands or obliga-

tions" of or against the Railroad Company, and the final judgment rendered against the Railroad Company in the District Court at Kansas City did not make them any the less "claims, demands or obligations." These claims, demands or obligations were by the interlocutory decree required to be filed with the Special Master by February 1, 1916, otherwise they were barred. (R. 639, 644). Respondents could as easily have filed claims in the receivership case as provided in the interlocutory decree as file them in the District Court at Kansas City for the purpose of ripening them into judgments. The evidence shows (R. 668) the filing with the Special Master of numerous claims, similar to those of respondents, which were then pending undetermined before the Interstate Commerce Commission, and those claims were allowed by the Special Master in such sum, if any, as the Commission should order reparation, and each such claim was allowed as a general unsecured creditor's claim and shared only in the order of distribution. Of the great total of claims of all classes filed with the Special Master under the interlocutory decree but a negligible amount had been reduced to judgment. Instead of availing themselves of the opportunity to file their claims, respondents have heretofore sought, and now seek, to capitalize their laches into an advantage over those holders of similar claims who diligently filed their claims as required by the interlocutory decree.

Respondents contended in the trial court, and in the Circuit Court of Appeals, that they had no notice of the terms of the interlocutory decree. This contention does not excuse their laches. Like orders are made in all receivership cases where foreclosure proceedings ensue or are contemplated, and lack of actual knowledge, where notice by publication is given as was done in this case (R. 641), does not furnish any excuse to the holder of a claim for failure to file it. The final decree in Article Tenth (R. 625) adjudged that notice had been given for the presentation in the receivership cause of claims and demands against the Railroad Company of every character and description whatsoever, and that the time for presenting such claims had expired. These are valid and enforceable provisions in favor of the purchaser. St. Louis Southwestern Ry. Co. v. Holbrook, 73 Fed. 112; Farmers' Loan & Trust Co. v. Railroad, 118 Fed. 204; Western New York etc. Railroad v. Refining Co., 137 Fed. 343; Manhattan Trust Co. v. Traction Co., 188 Fed. 1006; Chicago, R. I. & P. Ry. Co. v. Commission Co., 284 Fed. 955.

The above cited cases recognize the power of the court to require claims against the insolvent to be filed within a fixed period or be barred. Western New York etc. Railroad v. Refining Co., supra, involved reparation ordered by the Interstate Commerce Commission.

Respondents have throughout this litigation insisted that their cause of action arose in 1908. Mr. S. H. Cowan

has continuously represented respondents from 1903 until the present time. Associated with Mr. Cowan in the litigation instituted in the District Courts at Fort Worth, Texas, Kansas City and St. Louis, was Mr. Deatherage, a lawyer living at Kansas City, who remained in the cases until his death in January, 1921. That respondents and their attorneys knew of the receivership proceedings is apparent from the testimony of Mr. Cowan, who stated that he knew that fact, that he had handled many receivership suits during his long practice and knew that orders are generally made from time to time by the courts in which such suits are pending, fixing the time for filing claims against insolvent corporations in receivership, and that such is the usual practice (R. 646). Questions relating to the receivership were involved in the suits instituted in the Federal Courts at Fort Worth, Kansas City and St. Louis. Aside, therefore, from the notice published as required by the court fixing the time for filing claims against the Railroad Company, respondents were chargeable with notice of the court's order.

Whatever puts a party on inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, and would lead to a knowledge of the facts by the exercise of ordinary intelligence and understanding. The question of actual notice is one of fact, but it is a question of law whether constructive notice is imputable to a party from particular facts, especially where, as in this case, the facts are not controverted. If a notice be pub-

lished in obedience to a positive law or a legal order, such publication, although not seen by the party sought to be charged thereby, is constructive notice upon him as a matter of law.

An illustration of the foregoing principles is notice by publication in administration. The law requires the notice to be given, and a party holding a claim against an estate will not be heard to say, when a claim is presented after the expiration of the time fixed by the notice for presenting claims, that he had no knowledge of the notice, and this is true although the holder of the claim be a non-resident of the state where administration is had. A notice published pursuant to positive statute is of no greater dignity, so far as charging constructive notice is concerned, than a notice published pursuant to a decree of court. A party having a claim against an estate in administration in a probate court knows that he must look to the records of that court to ascertain the progress of the proceedings, as his rights may be affected thereby, and the party claiming the right to assert a demand against an estate administered in receivership proceedings is required to know that he must examine the orders therein made if he expects to be protected thereby. When the sale of the property of the Railroad Company under the final decree in the receivership case was confirmed, respondents were present in court (R. 587), and should have sought to have the final decree amended, or a provision incorporated in the order confirming the sale with respect to their claims, and if this was denied they had the right to appeal. They did none of these things. It is just as important that a time limit for filing claims against an insolvent, whose estate is administered by receivership proceedings, be made, as that a time limit should obtain for filing claims against decedents, bankrupts and assignors.

The following quotations from Wood v. Carpenter, 101 U.S. 135, are peculiarly appropriate to the situation. At page 139 is the following:

"Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar."

# At page 140 is the following:

"It is hard to avoid the conviction that the plaintiff's conduct marks the difference between forethought in one condition of things and afterthought in another." Further at page 141:

"Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it. The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it. A party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it."

Again, at page 143:

"There must be reasonable diligence, and the means of knowledge are the same thing in effect as knowledge itself."

In The Lulu, 77 U. S. 192, l. c. 201 and 202, is the following language:

"Express knowledge of the fact that the Master had sufficient funds for the purpose is not necessary to maintain the charge of bad faith, as it is well-settled law that a party to a transaction, where his rights are liable to be injuriously affected by notice, cannot willfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice if it had actually been received; or, in other words, the general rule is that knowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that if he had exercised due diligence he would have ascertained the truth of the case, is equivalent to actual notice of the matter in respect to which the inquiry ought to have been made."

Respondents are brought squarely within the doctrine of the above cited cases. They are bound by the orders in the receivership case, are conclusively held to have had notice of the order requiring the presentation of their claims, and cannot say that they had no such notice, because, if for no other reason, they are invoking the benefits of the final decree which solemnly adjudicates that they have had due notice for filing their claims and having failed to do so are barred. They cannot successfully assert a claim under the final decree which finally adjudicates the claim against them.

It is true that respondents on August 29, 1916, the date of the confirmation of the sale, gave notice to the parties to the receivership suit that they claimed, and intended to enforce their claim, that they had liens upon the property sold to the purchaser, prior in right and superior in equity to those of any and all parties whomsoever (R. 587). They, however, made no effort to have the final decree amended to protect their alleged in-

terests, and took no other action to secure any relief from the orders and decrees theretofore entered, but waited until December, 1920, more than four years after the sale was confirmed, before taking any action whatever to protect themselves. In the opinion filed in the District Court on dismissing respondents' interventions, Sanborn. Circuit Judge, in discussing this additional element of laches, held (288 Fed. l. c. 624) that an actual commencement of an action was indispensable, and that the notice of August 29, 1916, was futile to destroy, stay or exclude the estoppel effected by their laches, quoting from Mackall v. Casilear, 137 U. S. l. c. 567, and Penn Mutual Life Insurance Co. v. Austin, 168 U. S. l. c. 697, that "the mere assertion of a claim, unaccompanied with any act to give effect to the asserted right, could not avail to keep alive a right which would otherwise be precluded because of laches."

There were no trust funds from the property of the Railroad Company in the hands of the District Court on December 2, 1920, to pay respondents' claims. The proceeds of the sale had been distributed, the property of the Railroad Company had been sold and conveyed to the purchaser, and the purchaser had paid for it. Its stock and bonds had gone upon the market under two decrees which barred respondents' claims more than four years before they applied for leave to assert them; and respondents presented no reasonable excuse for their delay.

If respondents had filed verified claims pursuant to the interlocutory decree, which they could have done at any time after that decree was entered and before the time for filing claims thereunder had expired, their claims, if established, would have been protected, and they would have shared in the proceeds of the sale of the property of the Railroad Company proportionately with other creditors who exercised diligence to file their claims. They are now barred as the result of their inexcusable laches. Under the circumstances presented, the holding of the Circuit Court of Appeals to the contrary is erroneous.

### VII.

The decision of the Circuit Court of Appeals that respondents' claims "arose" after the entry of the final decree, and that respondents were not precluded by the final decree and order of confirmation of sale from asserting said claims, is erroneous,

Respondents are claiming under the final decree and order of confirmation of sale, and are bound thereby. This the Circuit Court of Appeals concedes. By their intervening petitions respondents invoked subdivision (B) of Article Ninth of the final decree (R. 623), which provides that the purchaser, as part of the consideration of the purchase price of the property purchased, should pay

"any unpaid claims of creditors of the Railroad Company which have been or shall be admitted by the parties in interest or adjudged by this court to be prior in lien or superior in equity to the Refunding Mortgage or to the General Lien Mortgage." Article Tenth of the final decree adjudges (R. 626) that notice having been given for the presentation of claims and demands against the Railroad Company of every character and description whatsoever, and the time for the presentation of said claims having expired, no such claim or demand which had not been presented in the cause in accordance with the orders theretofore made requiring presentation thereof, other \* "(2) any claim or demand which may arise after the entry of this decree", should be enforceable against the receivers, the property sold, or the purchaser, nor should the holder of any claim or demand not so presented be entitled to the benefits of Article Ninth of the decree, nor be entitled to share in the distribution of the proceeds of the sale.

Respondents have consistently contended that their claims arose in November, 1908, and prior thereto, and that the liability of the Railroad Company in respect thereof was established in January, 1914, when the Interstate Commerce Commission made the order of reparation. The Circuit Court of Appeals ruled that respondents' claims "arose" after the entry of the final decree, and hence that respondents are not barred by that decree from asserting their claims. This decree was entered by

Sanborn, Circuit Judge, and his construction of the word "arise" as used in the foregoing quotation from Article Tenth of the decree should control. His views are expressed in his opinion in this case (288 Fed. l. c. 625), as follows:

"The view of the special master was that the word 'arise' in the exception, 'other than any claim that may arise after the entry of this decree,' did not mean 'accrue,' and that, while the claims of the interveners did not accrue after the entry of the decree, they arose thereafter, and hence were excepted from what seems to the court to be the plain and comprehensive bar of all claims not presented as required by the interlocutory decree contained in that decree and in the final decree. But after thoughtful consideration the court is unable to adopt this view, or to resist the conclusion that the meaning of the word 'arise' in the connection in which it is here used was identical with the meaning of the word 'accrue'-that none of the claims of the interveners either arose or accrued after the entry of the decree, and that they all fall under the ban of both decrees."

In support of the construction placed by the trial court on this provision of the final decree, reference is made to Phillips v. Grand Trunk Ry. Co., 236 U. S. 662, 666, wherein this language appears:

"When the overcharge was collected a cause of action at once arose and the shipper at once had the right to file a complaint to intervene in proceedings instituted by others." This proposition is also supported by the decisions of this Court in Southern Pacific Co. v. Darnell-Tanzer Co., 245 U. S. 531, 534, and Louisville Cement Co. v. Interstate Commerce Commission, 246 U. S. 638, 644.

The construction placed by the Circuit Court of Appeals upon the word "arise" as used in the final decree is a strained construction, and one widely at variance with the construction placed thereon by the court which entered that decree and with the intent with which that word was embodied in the decree.

For the reasons above given, it is respectfully submitted that the decree of the Circuit Court of Appeals should be reversed.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1926. No. 577.

ST. LOUIS AND SAN FRANCISCO RAILROAD COM-PANY and ST. LOUIS-SAN FRANCISCO RAIL-WAY COMPANY,

Petitioners.

v.

E. B. SPILLER, et al.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## REPLY BRIEF FOR PETITIONERS.

EDWARD T. MILLER, ALEXANDER P. STEWART, FREDERICK H. WOOD, Attorneys for Petitioners.

ROBERT T. SWAINE, Of Counsel.



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#### IN THE

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Petitioners,

e.

E. B. SPILLER, et al.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

### REPLY BRIEF FOR PETITIONERS.

I.

The respondents' arguments in support of the contention that the Railroad Company was a trustee ex maleficio are inconsistent both with the provisions of the Act to Regulate Commerce and with the nature of a shipper's right to redress for exaction of unreasonable charges prior to the passage of that Act, and are unsupported by authority.

The right to sue in equity for the establishment of a trust ex maleficio is an ancient one. The right of a shipper to maintain a common law action to recover amounts collected in excess of a reasonable rate, wherein it was the function of the jury to determine whether the charge collected was unreasonable, and if so, to award damages in the amount of the excess, also long antedates the Interstate Commerce Act. Texas & Pacific v. Abilene Cotton Oil Company, 204 U. S. 426. No case is cited by respondents, and we have found none, holding that there was concurrent jurisdiction in equity to establish a trust ex male ficio in such amount as might be determined by the Chancellor. In the absence of any authority, since the remedy at law was adequate, it may be safely asserted that no such right existed prior to the passage of the Interstate Commerce Act.

Certainly no such right was created by that Act. Under it, reparation is recoverable only on "an award of damages" made by the Commission, enforceable in a civil suit to "proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated." Under the law as it now stands such suit may be brought in either a Federal or a State court. At the time these charges were collected, however, the statute provided for the bringing of such suits in Federal courts only. Hepburn Act, Sec. 16, 34 Stat. 584, 590.

It admits of no doubt that it was the purpose of Congress, under the law as it then was, to make the statutory remedy exclusive of all others. The existence of a concurrent right in equity to sue for the establishment of a trust ex maleficio as of the date of collection is wholly inconsistent with the statutory remedy provided, as pointed out in our opening brief (pp. 37-44). But even assuming a concurrent remedy in equity, it would seem that, the respondents having made their election to sue at law, and their original cause of action having been merged in a money judgment, they have lost their right to proceed in equity. Cf. Equitable Trust Co. v. Conn. Brass & Mfg. Corp., 290 Fed. 712, 724.

Respondents' contention is also inconsistent with the substantive provisions of the Act and with its general theory. A violation of Section 1 (making the collection of unreasonable charges unlawful) unlike violations of Interstate Commerce other sections of the Act, does not constitute misdemeanor. On the a other hand, if Section 6 (requiring the collection and payment of charges in accordance with published tariffs) is violated, both shipper and carrier are guilty of the commission of a crime. It is conceded that respondents' cause of action, whether in law or in equity, accrued when the charges were collected (Respondents' Brief, p. 27). It follows that if a trust ex maleficio then arose, the creation of the same could have been avoided only by the commission of a crime on the part of both shipper and carrier. It is not unusual for a trust ex maleficio to arise through the doing of an act amounting to a crime. The suggestion that it may also arise under such circumstances that it may be avoided only by the commission of crimes on the part both of the person sought to be charged as a trustee and the cestui que trust as well, is, to say the least, novel.

The primary purpose of Section 1 was to establish a standard of rate making. What is a reasonable rate is a matter of judgment, the duty to exercise which is in the first instance placed upon the carrier, subject to review by the Commission. A finding by the Commission that the carrier's rate is unreasonable merely means that, in the opinion of the Commission, the carrier erred in its judgment. Trusts ex maleficio customarily arise from acts involving moral turpitude, such as active fraud, breach of fiduciary relation, physical duress, etc. Clearly such a trust does not arise through the exercise of an honest but mistaken judgment on the part of a person whose duty it is to exercise such judgment.

If the theory of the respondents is sound, every railroad in the United States at all times has in its possession indeterminate sums of money which it is holding in trust for unknown persons, dependent upon whether or not the Interstate Commerce Commission makes reparation awards on complaints filed within two years from the date of collection of such charges.

We know of no rule of equity under which trust arises where the circumstances are such that neither party to the transaction knows, or can know by the exercise of any amount of diligence, whether such trust exists or not, until there has been a judgment by an entirely independent tribunal in some other case then pending or which may never be brought. The fact that in this particular case the Commission had already held the rates to be unreasonable is without significance. It had made no order upon the carrier to cease and desist from their collection, but re

opened the case, took further testimony and did not finally decide it for more than two years after its first decision. In the meantime it was the carrier's right and duty to collect published rates. Furthermore, respondents' contention necessarily rests upon the theory that the exaction of an unreasonable rate gives rise immediately to the creation of the trust asserted, whether proceedings are pending at the time or not.

Respondents cite many cases in support of their position. Of these, all save Lore v. North American Company, 229 Fed. 103, are of the familiar type in which courts of equity from time immemorial have established and enforced trusts arising from some breach of fiduciary duty, fraud, physical duress, or the appropriation of property without right and under such circumstances as at the time give rise to the creation of a trust. In this case the charges were collected not only in the exercise of the carrier's right conferred by the Interstate Commerce Act to fix its own charges, but under a mandate of Congress to collect the amounts so fixed.

In Love v. North American Company, supra, the carrier had been ordered by the Corporation Commission of Oklahoma to reduce certain rates. The carrier appealed to the Supreme Court of the State, as permitted by the State Constitution. As a condition precedent to the collection of its old charges, the carrier was required to give a supersedeas bond to pay back any amounts collected in excess of the rates determined to be reasonable, and to keep in a separate account a list of all excess charges collected. Its right to continue to collect its old rates was dependent upon its observance of these conditions. The

Commission's rate orders were affirmed, and within six months thereafter the carrier went into the hands of receivers. The proceeding in which the decision of the court was rendered was not a suit for the recovery of the excess over a reasonable charge, as such, but was a proceeding to recover on the bond, on which the cause of action had accrued within six months prior to the appointment of the receivers, and to have the claim allowed as preferential. The court held that such a preference should be allowed, as in the case of payments to sureties on other supersedeas bonds. The court also said that the moneys collected did not belong to the railroad company and should be repaid. It is on account of this language that the case is cited as authority for respondents' trustee ex maleficio theory.

We entertain some doubts as to whether the case was rightly decided, and it is, of course, not binding upon this Court. Passing that, however, it is apparent that the conditions were exceptional, and that the case is clearly distinguishable from this one. Except for the giving of the supersedeas bond, the carrier would have been compelled to obey the order of the Commission pending appeal, whether the orders were finally affirmed by the court or not. It was also required to keep in a separate account a list of all excess charges collected. While the amounts collected pending such appeal were not technically impounded, the court might well hold that since the right to collect was thus conditioned, the effect in equity was the same as though the amounts collected had been actually impounded and held in trust, awaiting the outcome of the appeal. The case is clearly no authority for the proposition that when an interstate carrier, in the exercise of the right and duty prescribed by the Interstate Commerce Act, establishes and collects charges named in its published tariffs, it becomes a trustee ex maleficio in the event that subsequently reparation is awarded upon the ground that the charges collected were unreasonable. If it be regarded as authority for such proposition, then the decision of the Circuit Court of Appeals in that case was clearly erroneous upon the grounds already stated.

The only other overcharge cases cited by the respondents in support of the trust fund theory are White v. Delano, 270 Mo. 216, and Mercantile Trust Co. v. St. Louis & San Francisco R. R., 69 Fed. 193. In White v. Delano, the suit was a suit at law, for money had and received, against the Wabash receivers for excess charges collected by the railroad company prior to receivership. No trust was declared and no preference allowed. In the Mercantile Trust case, the intervenor was the holder of a judgment against the railroad company obtained prior to the making of the mortgage being foreclosed. At the time the mortgage was executed, the enforcement of the judgment was suspended. The court held that the suspension of the enforcement of the judgment did not the lien of the judgment. Therefore, the lien of the mortgage was subject to that of the judgment. judgment was originally on account of an excess charge, but in view of the decision, the court's denunciation of carriers exacting excess charges, is mere dictum.

The respondents have failed to trace the moneys collected, except into the general estate of the Railroad Company, and their contention that such tracing is sufficient to impose a trust upon the receivership estate or the property of the reorganized company is unsupported by authority.

The respondents have failed to trace the moneys collected except into the general estate of the Railroad Company. The argument that such tracing is sufficient to impose a trust upon the receivership estate or the properties of the reorganized company misconceives the doctrine of tracing trust funds.

The facts before this Court (R. 164, 331) show only that the many collections of overcharges went into various unspecified bank accounts of the Railroad Company; that the various bank balances of the Railroad Company, and later of the receivers, taken together, have, at all times since the collections were made, exceeded the total amount of the overcharges. It is not shown how much of the money was deposited in any specified bank accounts, nor in how many bank accounts these deposits were made. It is not shown that any particular bank account has always exceeded in amount the total amount of overcharges deposited in it. It is not shown that the bank accounts into which the overcharges were paid in 1906 and 1907 are the same bank accounts that exist today. Upon such facts, respondents cannot properly say that there has been a tracing of the funds, in the sense in which this doctrine is applied by courts of equity.

The language of the court in In re A. D. Matthews' Sons, 238 Fed. 785, is exactly applicable to this case:

"But further there is no proof as to what bank or fund received any of petitioner's money \* \* \*.

In other words, the most that petitioner can do toward bearing the burden of proof is to show that its money was put in three funds, or some one or more of them; but when or in what proportions cannot be spelled out. Such evidence amounts to no more than showing that somewhere there was in the bankrupt's possession or under its control, until the times complained of, more cash or credits than petitioner now claims. This is not identification at all, nor is it tracing, for cash is never traced by showing that it went into the general estate; and the proof here goes no further." (Italics ours.)

The cases cited by the respondents do not support the doctrine for which the respondents contend. They are all cases in which either it was clearly not necessary to trace the funds at all, or in which the trust money was traced into a particular account or fund and there mingled with the funds of the trustee.

In the case of Terre Haute & I. R. Co. v. Cox, 102 Fed. 825, relied on by respondents, there was an equitable assignment of a portion of the gross earnings of the railroad to its lessor. The lease was a matter of public record, of which all creditors had notice, so that no rights of bona fide purchasers or creditors intervened. The gross earnings for six months ending about two months prior to receivership were alleged to be insufficient to pay operating expenses of the leased property, so that the entire gross earnings were consumed in operating expenses. The lessee

had other moneys which it could and should have used to pay such expenses, and which came into the receiver's hands and were being held for the benefit of the railroad's creditors. The court quoted the general language about following misappropriated property, which is set forth in respondents' brief. But its decision was clearly placed upon the ground that the funds which in equity belong to the lessor having been misappropriated for the benefit of the creditors of the lessee, the other moneys of the lessee coming into the hands of its receivers were, as against such creditors, charged with an equitable lien in favor of the lessor. There was no problem of "tracing" in this case.

In the case before this Court, there is no showing that the funds were applied to the benefit of the creditors, and there are rights of *bona fide* purchasers intervening.

If the *Terre Haute* case, which is of course not binding upon this Court, can be regarded as supporting the proposition that it is sufficient to trace converted moneys into the general estate of the trustee *ex maleficio*, then it is contrary to the great weight of authority.

The other cases cited by the respondents are so clearly distinguishable from the case at bar that no comment is necessary. Upon pages 45 and 46 of the respondents' brief two familiar rules are quoted:

"It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof which came to the hands of the Receiver", "Proof that a trustee mingled funds with his own and made payments out of the common fund is a sufficient identification of the remainder of that fund coming to the hands of the Receiver, not exceeding the smallest amount the fund contained subsequent to the commingling."

These two rules are correct statements of law and are consistent with each other. The second statement had reference to trust funds mingled in a particular deposit and its only application is to such a case. Yet if the respondents were correct in believing that that quotation can be applied to the present case, the first statement would be meaningless. If it is only necessary to show that the trust moneys were converted into various unspecified bank credits belonging to the insolvent, and that the insolvent's total credits of this kind have always been in excess of the trust moneys, then the tracing of funds becomes a very simple matter indeed in all cases where the insolvent has any considerable estate.

In the case at bar, there was no particular deposit, but rather a series of deposits and a series of funds, and there is no proof of the continued existence of these individual funds up to the time of the receivership. This is not tracing. It is only showing that the moneys went into the "general estate" of the railroad.

#### 111.

The respondents are not entitled to an equitable preference.

Both the District Court and the Circuit Court of Appeals held that the respondents are not entitled to an equitable preference. Respondents' arguments that they are entitled to an equitable preference are based, first, upon the statement that money, even more than supplies, labor, etc., is necessary for the operation of a railroad in the usual course of its business, and hence should rank equally therewith, and second, upon the decision in Lore v. North American Company, supra. Money advanced to a railroad company within six months, or any other period. prior to receivership, does not give rise to an equitable preference, even though used for operating expenses. Morgan's Louisiana and Texas Railroad and Steamskip Co. v. Texas Central Ry., 137 U. S. 171; Penn v. Calhonn, 121 U. S. 251; Farmers Loan & Trust Co. v. Bankers & Merchants Tel. Co., 148 N. Y. 315; Blair v. St. Louis, II. & K. R. Co., 23 Fed. 521.

We have already reviewed the Love case and pointed out that the claims were not presented as reparation claims, but as claims arising out of the enforcement of a supersedeas bond, where the cause of action accrued within six months prior to the appointment of a receiver, and that a preference was allowed on the same principle that similar preferences are sometimes allowed in the case of other supersedeas bonds. The authorities differ as to whether the claims of sureties on supersedeas bonds are entitled to a preference.\* In either event the Love case is not anotherity for the allowance of a preference to the respondence in this case.

Respondents seek to distinguish Chirago & Alton Bailroad Company v. Trust Company, 225 Fed. 900 (cited in
our opening brief, p. 16) holding that overcharge claims
were not entitled to an equitable prederence, again the
ground that the comm was presented by a communing cartier which had refunded the overcharges, instead of by the
shipper himself. The case cannot be disposed of in
this manner. If overcharge claims are predormanal,
they should be allowed for the benefit of commuting curriers, who have themselves required the charge and thurshy
become subregated to the rights of the shipper, as well as
of the shipper himself. But they are not predominal.

No case has been vited, and none has been femal, in which it has been held that either overcharge claims or reparation claims are entitled to an equitable professore. Nor has it been the practice throughout the last half a century or more, during which a large proportion of the mileage of the American railroads has passed through the hands of receivers, to allow such claims as professorial. The fact that such claims have not been so allowed is at least personsive that they are not entitled to a great-sense.

\*The following cases bold such claims were untitled to provide Chains
Trace i.e. v. Marrigon, 120 U. S. 201: Farmony Leans and Francisco, v.
Landore Parish R. R. i.e., 71 Field 245; i.e., Francisco, v. Svenden Sodie
of Francisco i.e., 118 Field 845.

The following space held such chains were not entitled to generally if kinds a control Transf co. of New Look, To Fed. 76. Transf a cross-Shorken & From Falls iff any Person co., 202 Ped. 760. Transfell of Transfell of New Look a, Frommulation 2. & F. K. co., 288 Ped. 808. (See See Fed. 808.) (See See Fed. 808.) (See See Fed. 808.) (See See Fed. 808.) (See See Fed. 808.)

The displacement of mortgage liens in behalf of mecured creditors "should be exercised with very graceare" (Miltonberger v. Logansport Railway Company, 16. U. S. 286), and preferential allowances, when made are of an exceptional character and should be restricted to delineurred for supplies or services not simply necessary for the preservation of the road, but necessary to its business. Gregg v. Metropolitan Trust Company, 197 U. S. 182. Certainly it will not be contended that liabilities incurred under orders requiring payment of reparation are claims of such character.

#### IV.

The respondents' claims are barred because they were not filed with the receivers in accordance with the orders of the Court.

The respondents are barred by their failure to file ther claims. It is customary and proper for the receivership court to make orders requiring the filing of claims within a specified period. As the court said in Phelan v. Middle States Oil Curp., 15 F. (2d) 88:

> "Important and necessary is it that the courts have power to require creditors to file their claims. The power to require infers the power to penalize. The penalty for failing to comply is usually a denial of participation."

While the filing of claims is sometimes allowed after the date limited by the court, and before the distribution of the estate,\* we have found no case in which a claimant, who had knowledge or notice of the receivership and sale, was allowed to come in and tile his claim after the estate The rule which permits the filing had been distributed. of claims after the time limited for filing has elasped, is restricted to cases where the claimant not only can slaw some equitable reason for his delay, and where no inequity will be done to other parties, but where the estate, in whole or in part, is still in the hands of the court. . .

This doctrine is merely an application of the rule that a valid foreclosure sale cuts off all creditors who have sot proved their right to participate in the distribution of the insolvent estate. The estate was distributed before the respondents made any claim to participate in it.

There is even a stronger reason for requiring the filing of claims which may be entitled to a preference and to be paid by the purchaser of the properties upon foreclosure of the mortgages. Such claims constitute a part of the purchase price, and must be paid by the purchaser in addition to the amount of his bid. Unless such claims are filed so that the bidder may take them into account, he must reckon the possibility that such claims may be presented in the future and must reduce his bid accordingly. The orderly administration of insolvent estates requires the filing of claims, whether preferred or not. After the sale has been confirmed and after the proceeds of sale have been distriisted to creditors, it is too late, as a practical matter,

<sup>\*</sup>Williams v. Gibbes, 17 How. 239; MacDonald v. Astna Indemnity 10. 31 Com. 339; Employers' Liability Agur, Corp. v. Astoria Mahogany

<sup>a. 3 (Cam. 339). Employees Labelity Agent. Corp. v. Attoria Mahogany
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\*\*Ppark v. New York &r. Ky., 140 Fed. 799; Halisted v. Forest Hill Co.,
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(a. v. Tuon City Motor Speedway Co., 138 Minn. 294; Blake v. Domestic Wig. Co., 41 Ast. 876 (N. J.); Altraham v. Mercantile Trust & Deposit
100 Mat. 264.</sup> (n. 80 Md. 254

to provide for the late comer without thereby treating the other creditors who have filed their claims, and the purchaser, inequitably. In reliance upon the effectiveness of the court's final decree, the securities of the new company had been traded in and sold to bona fide purchasers. for over four years before respondents filed their intervening petition. It would be most inequitable to permit the respondents to upset that decree as to their claims. There is no reason why respondents, whether or not entitled to a preference, should stand in a better position than any other contract or tort creditors, or be excused from the diligence which courts of equity exact from claimants against insolvent estates. Respondents sat by and permitted the sale of the estate, the confirmation of the sale and distribution of the proceeds. They are barred by their failure to file their claims from enforcing them now to the detriment of bona fide purchasers.

#### V.

The respondents cannot recover under the doctrine of the Boyd case.

In respondents' brief (pp. 57-60) it is contended that they are entitled to recover under the rule announced in Northern Pacific Railway Company v. Boyd, 22 U. S. 482, whether or not their claims are preferential and whether or not there is a trust, since the stockholders were given an interest in the reorganized company.

It is not open to respondents to make such a contention in this proceeding.

First, the proceeding was instituted by a petition of intervention in the receivership case, which on its face was filed "pursuant to the final decree entered therein" and sought relief as a preferential creditor under such decree (Intervening Petition, R. p. 14 et seq.). Respondents may not attack the validity of the very decree under which they are claiming.

Second, even assuming that respondents may claim both under and against the decree at the same time and in the same proceeding, their petition of intervention is wholly lacking in the averments necessary to raise the issues of fact and law involved in any suit based upon the rule announced in the *Boyd* case. It did not allege that the stockholders of the old company participated in the reorganization, or that, if they did, a fair and timely offer of participation to general creditors was not made.

Third, even assuming that respondents may claim both under and against the decree at the time and in the same proceeding, and further that they may recover even though the averments of their intervening petition are insufficient to state a cause of action under the Boyd case, the record before the Master is wholly deficient to support the relief sought. The final decree, (R. p. 634) provided in effect that if the purchaser should be a corporation in which stockholders of the old company were given participation, such sale would not be confirmed in the absence of a fair and timely offer of cash or of participation in such corporation, to general creditors who had presented their claims in accordance with the orders of the court, and reserved jurisdiction to determine whether such offer had been made and to modify the decree in case the court determined that no such offer had been made. The order of confirmation (R. p. 679), recites that a fair and timely offer of cash or a fair and timely

offer of participation in the new company had been made in accordance with the foregoing provisions of the decree.

There is no evidence as to what the offer made was, what conditions, if any, were imposed thereon, the time, if any, within which the same was required to be accepted, or whether the offer as made actually extended to creditors who had not filed their claims in the receivership proceedings as well as to those who had. Without these facts before it, this Court cannot determine whether not a fair and timely offer had been made and the requirements of the rule announced in the *Boyd* case satisfied.

The only evidence in the record that stockholders of the old company were given participation in the reorganization is that contained in the Reorganization Plan offered by the respondents. Its reception in evidence was objected to generally and also specifically, if offered for the purpose of discrediting the final decree. Counsel for the respondents was also asked to state the purpose for which it was offered, and in stating the purpose he did not indicate that it was offered as a basis for any relief under the rule announced in the *Boyd* case (R. pp. 340, 341). It thus appears that neither in the pleadings nor in the taking of testimony before the Master was any claim under the rule of the *Boyd* case raised or the facts relevant to the existence or non-existence of such a claim developed.

The respondents cite Central of Georgia Ry. Co. v. Paul, 93 Fed. 878; Walden v. Bodley, 14 Pet. 156; Guardian Trust Company v. Cambria Steel Company, 210 Fed. 696, in support of their right to raise this contention. In each of these cases, while there were certain formal defects in the proceedings, the pleadings raised all the issues of fact and law essential to the relief sought, and the record contained

all the facts necessary to a determination of the question decided.

The respondents, therefore, may not recover under the rule announced in the *Boyd* case, first, because by seeking relief under the decree they are precluded from attacking it; second, because the intervening petition does not tender the issue; and third, because the facts necessary to a decision thereunder are not before the Court.

In these circumstances, it is hardly appropriate to discuss the merits of any claim that respondents may have under the rule of the Boyd case. We desire, however, to point out that the order of confirmation recites that a fair and timely offer was made to all crediers who had filed their claims in accordance with the orders of the court. It is said by the respondent in their brief that no offer was made specifically to them. In only the most narrow sense is this true; even the meagre evidence in the record shows that in legal effect an offer was made to them which the court administering the property found to be fair and timely (R. p. 679). In the administration of a large railroad receivership and the perfection of reorganization plans thereunder, the reorganizers are not required to search out every creditor and address to him in person, as contrasted with his class, a specific offer in order to satisfy the requirements of the Boyd case. As a practical matter, such a requirement would be impossible to meet. Only creditors whose claims are allowed in the receivership proceedings are entitled to distribution of the proceeds of sale. Creditors not presenting their claims for allowance, in accordance with the orders of the court, are barred. Participation by creditors in a reorganization plan is merely a substitute for their acceptance of their

distributive share of the proceeds. Indeed, it is believed that to extend an offer to creditors who are not entitled to share in the proceeds of sale would make the offer unfair to the other creditors whose claims have been filed and who are entitled to share in the proceeds of sale. An offer to creditors entitled to share in the proceeds of the res sold must necessarily satisfy the rule of the Boyd case, for the right of the creditor established by that case is predicated upon his equitable interest in that res. And since every creditor of the insolvent Frisco, including the respondents, was given ample opportunity to file his claims, an offer to creditors based upon their filed claims was in legal effect an offer to all creditors. Every creditor was thus afforded "fair opportunity, measured by the existing circumstances, to avail himself of this right." Kansas City Terminal Railway Company v. Central Union Trust Company, 271 U. S. 445, 454.

Manifestly, if claims of general creditors may be barred because not filed, the right of such creditors to attack the decree as void as to them, where a fair offer was made to those who did file, may likewise be barred by the court's decree. Only creditors who have filed their claims may participate in the proceeds of sale, and only to such creditors need offers be made, to be accepted by them at their election in lieu of their share in such proceeds. It is inconceivable that, while a creditor who has filed his claim can be limited to a choice between his distributive share of the proceeds of sale and a participation in the reorganization, a creditor who has not filed his claim may recover its entire amount in cash from the purchaser. All that a creditor would have to do, in order to be paid in full, would

be to refrain from filing his claim. It may be noted in passing that in a case arising out of this reorganization, Judge Sanborn held that a creditor who had not filed his claim was bound by the adjudication of the fairness of the offer to creditors and might be enjoined from prosecuting in a state court an action founded on the rule of the *Boyd* case. St. Louis-San Francisco Ry. v. Wall, Cons. Cause Eq. No. 4857, D. C., E. D. Mo., E. Div., July 1, 1918 (not reported).

It would be especially inequitable to grant relief to these respondents under the rule announced in the Boyd case. They had actual knowledge of the receivership and were put on notice as to the provisions of the orders made therein. Their own senior counsel testified (R. p. 646) that, of his own experience in receivership cases, he knew it was customary for the court by order to require presentation of claims within a designated period. Yet they made no effort to find out what the requirements of the court were, or to file their claims in accordance therewith, although they could easily have filed them and at the same time prosecuted their actions at law for the enforcement of the Commission's award, as is constantly done where the validity of a claim asserted is already in litiga-See Kline v. Burke Construction Co., 260 U. S. tion. Indeed, counsel must have known from the 226 beginning that, whatever the outcome of their litigation on the reparation award, in order to have any claim against the receivership estate, either as a preferred or general creditor, they were required to file their claims in accordance with the order of the receivership court. It also appears that they likewise had actual knowledge of the orders of the court and presumably of its decree, prior to confirmation of sale, and that they were present at the hearing on confirmation (R. p. 587). They did not at that time. although present in court, call their situation to the attention of the court, ask leave to file their claims nunc pro tunc, ask for an exception of the decree in their behalf pending the determination of their litigation, ask leave that the offer of participation in the reorganization scheme be kept open to them, or take any steps to present their claims for adjudication, either as preferred or general creditors, prior to complete distribution of the proceeds of sale. If they did not bring themselves within the class to which a specific offer was made, it was their own fault, and it would be clearly inequitable to permit them now to recover the full amount of their claim on the theory that the sale was void as to them, and thus to be preferred to other general creditors, who had filed their claims and had either accepted the offer or taken their distributive share of the proceeds of sale. True, they served notice of their claims upon the attorney for the Reorganization Committee, but, as pointed out by Judge Sanborn, the service of such a notice is not an adequate substitute for legal action (R. p. 229).

In any event, upon this record, without any showing as to what the offer was, how made, upon what conditions, and for how long, we are confident that the Court will not decide that a decree cutting off creditors who have not filed is void, even if it were open to the respondents to make such contention in this case. It is respectfully submitted that the decision of the Circuit Court of Appeals should be reversed.

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IN THE

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## WHERE COURT OF THE PARTED STATES.

OCTORER TERM, WATER.

TOURS AND SAM PRINCIPLES SERVINGS COMPANY.

Petitioners

Sen. 3677.

E. B. SPRLIN et al.

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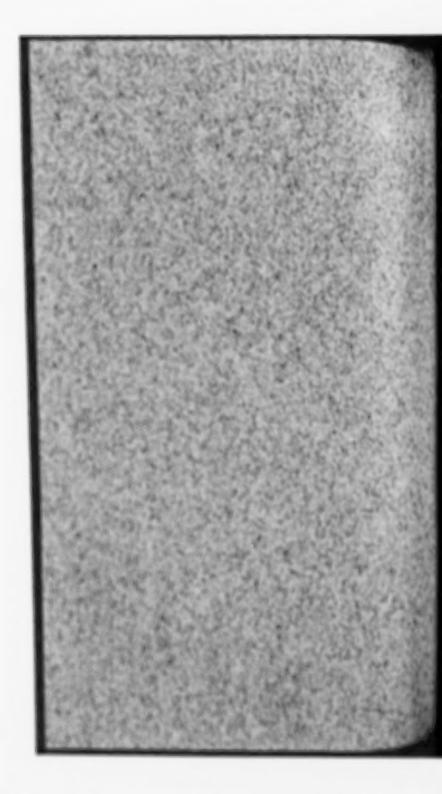
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#### IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,

Petitioners,

No. 577.

VS.

E. B. SPILLER et al.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

#### FOREWORD.

This case involves the right of certain cattle shippers to receive preferential payment under a reparation judgment rendered by this Court affirming the award of the Commission, in the case of Spiller et al. v. Atchison, Topeka & Santa Fe Railway Company, 253 U. S. 117, against nine carriers, eight of whom, presumably, have paid the judgment of this Court. During the pendency of these proceedings before the Commission for an award of reparation, which originated in an advance by certain carriers of cattle rates in the year 1903 to the extent of

3 cents a hundred from Southwestern points to various markets, the St. Louis & San Francisco Railroad Company, one of the carriers, went into the hands of Receivers on May 27, 1913, under consent proceedings (Rec., p. 11). This Railroad Company, its Receivers and its successor, have, at all times, contested the right of the shippers (respondents herein) to obtain reparation for these excess charges. The history of this litigation is well set out in the opinion of the United States Circuit Court of Appeals in this case (Rec., pp. 699 to 704), and shows that, from 1905 to date, respondents have been diligently endeavoring to recover from these petitioners the excess charges, paid by them and condemned by the Commission in its reparation orders and by this Court in its judgment supra.

Petitioners in their application do not contend that, if the excess charges were unlawfully collected from respondents, the Court of Appeals was in error in applying the doctrine of trust ex maleficio as to such excess charges, provided such fund was sufficiently identified and traced. Their contention is that because the excess charges were collected under the published tariff they were, therefore, "lawfully" collected, and for that reason there was no basis for the application of the trust ex maleficio doctrine. The decision of the District Court proceeded upon this theory, namely, the alleged lawful collection of the excess charges, and did not discuss the question of the identification or tracing of the funds (Rec.,

pp. 199 to 222, opinion of District Court). Previous to this opinion, the same Court had written a memorandum opinion granting leave to the respondents to intervene in the receivership suit of petitioners (Rec., pp. 57-58), which intervention asserted the right to preferential payment by reason of the trust ex maleficio doctrine, and at that time the defense, namely, the denial of the application of the trust ex maleficio doctrine by reason of the published rate, was urged and considered by the Court; the Court, however, wrote the memorandum opinion granting leave to file intervening petitions (Rec., pp. 57-58) which is as follows:

"Filed February 12, 1921.

"Sanborn, Circuit Judge:

"In view of the opinion in Love v. North American Company, 229 Fed. 123, and of the averments of the applicants, that on account of the necessity of first establishing their claims by the findings and orders of the Interstate Commerce Commission they could not have enforced them in the foreclosure proceedings at any time before February 1, 1916, the limit of the time fixed for presenting claims by the orders in those proceedings; that they have been diligently establishing these claims by necessary litigation before the Interstate Commerce Commission, the District Court and the Supreme Court, and that they notified the attorneys for the purchasers at the foreclosure sale before they paid for the purchase of their claims and their intention to press them, the Court is not persuaded that they are barred in this

court of equity from a presentation and consideration of their claims either by the orders limiting the time within which claims were to be presented in the foreclosure proceedings or by the inexcusable laches of the applicants."

It is obvious that, if the published rate theory, now and then urged by Petitioners, precluded Respondents from establishing their claim on the basis of a trust ex maleficio, then the application, at that time, should have been denied, because that objection was continuous and, if valid, was as fatal when the interventions were allowed, as it was when the District Court's decision was rendered. If that theory is sound, then there could be no reparation under the Commerce Act as developed, infra

#### STATEMENT OF FACTS.

The statement of facts in the petition under paragraph I, "Statement of Matter Involved," pp. 2 to 10, both inclusive, omits some important facts, found by the Special Master and affirmed by the United States Circuit Court of Appeals in its opinion in the instant case. (Report of Special Master, Rec., pp. 123-178, and opinion of the United States Circuit Court of Appeals, Rec., pp. 699-722.)

These omitted matters are as follows:

First. That under the accepted plan of reorganization the stockholders of the St. Louis & San Francisco Railroad Company (hereafter called the Frisco Company), put into receivership by consent decree, were to receive, and did receive, more than forty-five million dollars of the stock of the new company (St. Louis-San Francisco Railway Company), as representing their equity in the property, without the payment of anything therefor. This is found to be a fact by the decision of the United States Circuit Court of Appeals (Rec., p. 702).

Second. That the intervenors received no offer of any kind for their claims in the reorganization, though offers were made to all other creditors, both secured and unsecured, the reason, no doubt, being, as stated in the opinion of the United States Circuit Court of Appeals that the proceedings to obtain the award and enforce it was:

"Against the constant opposition of the railway company, its Receivers and the railway company, their claims had been established in the District Court and in the Supreme Court of the United Status" (Rec., p. 721).

#### And the Court also said:

"Through all these years the attorneys for the sulroad company, the Receivers and the railway company fought these demands of intervenors. The railway company, through its attorneys, conducted the contest in the Supreme Court of the United States. It would seem that the intervenors were about as persistantly and consistently diligent as litigants could be" (Ros., p. 707).

It would be manifestly inconsistent to make an offer to intervenors when their claims were being consistently and persistently contested.

Third. "It is established by the record here that, AT ALL TIMES AFTER THE EXCESSIVE FREIGHT CHARGES WERE COLLECTED AND DOWN TO THE RECEIVERSHIP, THE RAILROAD COMPANY HAD IN ITS TREASURY MONEY IN EXCESS OF THE CLAIMED OVERCHARGES, AND THAT IT TURNED OVER TO THE RECEIVER SOME \$100,000,000 (Rec., Opinion of the U. S. Cir. Ct. of Apps., p. 715). (Black caps corts.)

The Court Found on a fact (Doc., p. 702) that is said; that is this SMR/000/00 "a large amount of each (charge by the round to be even \$5/000/000/00 (Special Massac's Report, p. 1521) was also turned even by the Receivess to the Recognition Buildway Company, largely is excessed the clubes of interveness."

The Special Master's supert (Rec., p. 190) shows that there was not a year from June 30, 1996, to May 25, 1905, the date of the common resolveredity, except the year sadiing June 30, 1998, when the operating income exceeded specifing expenses, including tuses, by \$5(360,000.85, that the operating income of the Prince Company did not exsed its operating expenses, including tuses, by excepsed its operating expenses, including tuses, by evensig (800,000.00).

The Special Master also finds (Rec., p. 170) that the operating income of the Prince Bulleoul Company from June, 1906, to May 25, 2003 (the date of the commut excelerability), was ever \$85,000,000.00; that, during the excelerability the operating revenues impely accorded the operating expresses, including factor. "The Received turned ever to the Bulleoul Company (the new company) ever \$5,000,000.00, after paying out large same of accorded to operating income as interest on boulded indetections and for betterments to the result and to the equipment, and for the purchase of new equipment." (Rec., p. 270).

With this sploudid financial second, the innecess and morphistocented might well ask: Why a commit received day? Fourth. The Special Master in his report (Rec., p. 162) finds that the Interstate Commerce Commission stated its conclusion in its opinion in the case of Cattle Raisers Association of Texas v. M. K. & T. Ry. Co. et al., 11 I. C. C. Rep. 296, l. c. 352, as follows:

"It has been found that the advances made during the year 1903, as shown by the appendix, were unjust and unreasonable, and that the present rates are unjust and unreasonable by the amount of said advances. The defendants should, therefore, be required to cease and desist from the maintenance of these rates. \* \*

# "All questions of reparation are reserved."

Subsequently, upon petition of the respondents to reopen this matter before the Commission, on April 14, 1908 (13 I. C. C. Rep. 418), the Commission reaffirmed its position of August 16, 1905, and again pronounced the rates excessive and unreasonable by the amount of the said advances (Opinion of the U. S. Cir. Ct. of Apps., Rec., pp. 699-700), and entered an order to that effect, which shows that the Commission, despite the fact that these rates were published, continuously condemned them as unjust and unreasonable to the extent of the 3-cents-per-hundredweight advance, which the Commission by its reparation award directed the carriers to pay.

This brings us, therefore, to a consideration of the grounds advanced in the petition for the issuance of a writ of certiorari in this case, and to the arguments and authorities offered in support thereof.

# STATEMENT OF ALLEGED HOLDINGS OF UNITED STATES CIRCUIT COURT OF APPEALS.

(Petition, p. 7.)

On pages 7 to 10 of the petition are set out the alleged holdings of the Circuit Court of Appeals in the instant case, which respondents assert require some correction.

These holdings are set out under six heads.

Point 1 asserts that the Court held that intervenors are not barred from presenting their claims by laches, either

- (a) by reason of their delay, or
- (b) by reason of failing to file their claims, as required by the interlocutory decree entered in the receivership case.

Point 2 states the holding of the Court in regard to the construction of the terms of the interlocutory and final decrees and the order of confirmation of sale, and the holding that intervenors were entitled to present their claims, after the expiration of the time limited thereby.

Since in the brief no attempt was made to discuss either the properation of laches or the effect of the construction of the terms of said decrees and order of confirmation, it is safe to assume that these two points have been abandoned by petitioners. The reasoning of the Court in its opinion on these two points (Rec., pp. 704-710) as to laches, and (Rec., pp. 710-714) as to the construction of

said decrees, is so conclusive that we merely refer the Court to the reasoning of the opinion on these two points to show that there is no merit in them.

Point 3, page , contains a misstatement of the Court's holding in regard to the action of the Commission, as above pointed out, because it asserts that the Commission afterwards found the excess rate charges to be unjust and unreasonable and hence unlawful, and that the finding of the Court that the railroad company became a trustee ex maleficio for the benefit of intervenors of such money so collected, was based upon the alleged said subsequent finding of the Commission.

On the contrary, the Court specifically held, as above stated, that, since the excess charges were unjust and unreasonable, they were, ipso facto, unlawful when collected, under section 1 of the act, that they were exacted under duress, under the compulsion of the statute, section 6, requiring the published tariff rate, and that said charges were condemned by the Commission as unjust and unreasonable by its decisions above referred to, both prior to their collection and subsequent thereto (Rec., pp. 715-716, and Rec., pp. 699-700).

Point 4 also contains an omission of facts found as the basis of the Court's holding. It omits any reference whatever to the fact, above set out, as to the \$300,000.00 always carried by the railroad company in its treasury and paid over to the Receivers and held by them, and the

\$5,000,000.00 sum paid over by the Receivers to the reorganized railway company. It also omits the fact that there were no other claimants to this fund except intervenors and a man named Love (Love v. North American Co., 229 Fed. 103), whose claim was paid under the judgment of the United States Circuit Court of Appeals of the Eighth Circuit (Rec., pp. 718-721; report of Special Master, pp. 150-151). And that after the payment of such claim there was still in the treasury of the railroad company at all times an amount of money largely in excess of claims of intervenors, which was turned over to the Receivers, as above stated; it also omits the further fact found by the Court that no offer of any kind was made to the intervenors, although offers were made to all other creditors of the Frisco Company, both secured and unsecured, and that the railroad company, prior to receivership, during receivership and subsequent thereto. and its successor at all times consistently opposed the claims of intervenors; it also omits the fact that under the decree requiring the Receivers to list all claims asserted against the railroad company or in Receivers the Receivers failed and refused to list intervenors' claims. The petition makes no reference to the service of the Commission's reparation order upon the railroad company or its Receivers, which is required by the Commerce Act, and presumably was served. This point also omits the fact that the stockholders of the old railroad company received over \$45,000,000.00 of common stock in the new company at par without paying one cent therefor (Rec., pp. 702-721; report of Special Master, p. 147).

Point 5 states that the Court held it was not inconsistent to file a bill against the railroad company as trustee ex maleficio for the excess freight charges when, prior thereto, an action at law for damages against the carrier, based on an order of reparation of the Commission, had been filed, and that such action was not such an election of remedies as defeated the right of intervenors to charge the railroad company as trustee ex maleficio, after the reparation claims had been reduced to judgment in the United States Supreme Court.

Under section 16 of the Act, the petition is upon the order, attaching it, and it is prima facie evidence, and the section further provides that: "A petition for the enforcement of an order for the payment of money shall be filed in the District Court \* \* within one year \* \* ." Thus, the suit and judgment were, upon the orders of the Commission, directing the payment of the unlawful rates collected.

Point 6, page 10, states the holding of the Court in regard to the preferential claims of intervenors, held by the Court to be superior to the rights of other creditors, including bondholders, and adjudged to be prior in lien and superior in equity to the refunding mortgage and general lien mortgage of the St. Louis & San Francisco

Railroad Company and directed to be enforced against the property conveyed to the St. Louis-San Francisco Railway Company as assignee of the purchasers at the foreclosure sale had in the consolidated receivership case, and that said claims should be collected with interest from August, 1, 1916. This point likewise omits any reference to the fact, found by the Court, that the Railroad Company, its Receivers and successors, at all times, retained the money of the shippers and persistently contested their claims.

Petitioners, on pages 10, 11 and and 12, "REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI," set out seven reasons for the purpose of bringing this application within the statute governing the issuance of writs of certiorari by this Court, namely,

Sec. 240 (a) of the Judicial Code, as amended February 13, 1925 (Chap. 229, Sec. 1, 43 Stat. 938; Sec. 1217, U. S. Comp. Stat. Cum. Supp. 1925), and Rule 35 of this Court, adopted June 8, 1925, effective July 1, 1925, 69 Law Ed. U. S. Sup. Ct. Repts. APPENDIX, pp. 1192-1193, amended June 7, 1926, West Reporter, U. S. Ad. Opinions, July 1, 1926.

Analyzing these said reasons, it will be observed:

That **Point 1** is based upon the alleged **subsequent find**ing of the Commission as to the rate being unjust and unreasonable, and avers that, when the rates were collected, they were the regular and legally established rates, and further avers that the Court in holding that such rates were wrongfully and unlawfully collected, had decided a federal question in a way in conflict with the applicable decisions of this Court.

It will be observed, as pointed out, supra, that the claim that the opinion was based upon said alleged "subsequent finding" is absolutely contrary to the holding of the Court. As to the alleged federal question, namely, that the rate was lawfully collected because in accordance with the published tariff, it will be pointed out, infra, in the argument that the holdings of this Court are to the exact contrary.

Point 2, page 10, is based upon the holding of the Court as to the trust ex meleficio doctrine arising from the collection of rates, thereafter found by the Commission to be unjust and unreasonable (the legally published rates at the time of collection), and avers that the Court had decided an important question of general law (the trust ex maleficio doctrine) in a way untenable and in conflict with the weight of authority, and has decided an important question of federal law (the collection of unjust and unreasonable rates, despite the published tariff) which has not been, but should be, settled by this Court.

It will be observed that the same erroneous premise as to said alleged subsequent finding is contained in point 2 as in point 1, and it will also be observed that it is not denied that, if the excess charges were unlawful, because unjust and unreasonable, as found by the Commission (its

award affirmed by the judgment of this Court) and condemned by section 1 of the act, then the proper basis exists for the application of the trust ex maleficio doctrine.

Point 3, pages 10 and 11, relates to the holding of the Court to the effect that it was not necessary for intervenors to prove that the identical money that they had paid had been placed in a separate account, or to trace the identical fund in the hands of the carrier, in order to become preferred creditors, and stated that in so holding the Court had decided a question of general law in a way untenable and in conflict with the weight of authorities, and particularly in conflict with decisions of other Circuit Courts of Appeal on the same matter.

This is an erroneous statement of the holding of the Court, which is in harmony with the great weight of authority on this point, including the decisions of this Court, and is a correct application of the law to the facts found by the Court in its opinion. We have pointed out, supra, the exact facts upon which this holding of the Court was predicated, all of which are omitted from the statement of facts of petitioners and from their argument. There is not the slightest reference to the \$300,000.00 held at all times by the old railroad company in its treasury and paid over by it to the Receivers and the sum of over \$5,000,000.00 paid by the Receivers to the new railway company.

This is pointed out, supra.

Point 4, page 11, relates to the question of remedy and avers that the Court, in holding that the provision in the Commerce Act for enforcing reparation is not exclusive and did not preclude a bill to charge the railroad company as trustee ex maleficio, decided an important question of federal law, which has not been, but should be, settled by this Court.

This matter is considered very fully by the Court in its opinion (Rec., pp. 718-719), where the Court cites the famous Abilene Cotton Oil Company case, 204 U. S. 426-446, discussing the provision in section 22 of the act providing: "And nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

The Court of Appeals points out that the right to impress a trust upon the fund must necessarily follow the establishment of the reparation claimed and that there could be no inconsistency nor could there be an election of remedies under the circumstances and that the intervention of respondents was in aid of the judgment of this Court, affirming the Commission's award of reparation, to secure the payment thereof. No execution could issue upon the judgment of this Court because of the status of the property transferred under the receivership foreclosure. Therefore, unless the bill to impress the trust could be maintained, respondents, fortified with the judgment of

this Court, would have been without remedy. The decision of the Court of Appeals is an exact application of the settled law to the facts of this case, in harmony with the Act and decisions of this Court.

Point 5, as to laches, page 11, and Point 6, as to the meaning of the decrees in the receivership suit, are not argued in the brief and are, therefore, we assume, not relied on.

As pointed out supra, these two points are so completely answered by the opinion of the United States Circuit Court of Appeals that they have been abandoned.

Point 7, page 12, relates to the holding of the Court that interveners have established preferential claims, superior to the rights of other creditors, to the extent of the judgment obtained by them against the Railroad Company in the District Court for the Western District of Missouri, with interest thereon from August 1st, 1916, and avers that this holding decided an important question of general law in a way untenable and in conflict with the weight of authority.

The holding of the Court on this point harmonizes with the great weight of authority, and especially with the decisions of this Court, as pointed out, infra, in the argument.

The rights of Respondents, established by the judgment of this Court, would be as "idle as a painted ship upon a painted ocean," if not made effective by the decree herein entered.

No one who has any just claim can be hurt by this decree as pointed out by the Court in its opinion (Rec., p. 721):

"Other creditors, bondholders, mortgagees, stock-holders acquired no interest of any kind in these excessive and unjust charges. Preferential allowance of the claims arising therefrom takes nothing from them to which they are entitled. The Railway Company received the property of the Railroad Company subject to these claims if allowed by the Court, as we have before pointed out, and hence suffers no wrong. Every consideration of equity and fair dealing demands that these claims should not be lost in a labyrinth of technicalities."

The petition concludes with the averment that the decree of the Circuit Court of Appeals is erroneous and that this case should be certified; prayer accordingly.

Summarizing the seven above points, it will be observed that it is asserted that the Court decided in Point 1 a question of Federal Law in conflict with the decisions of this Court. In Point 2, a question of general law in conflict with the weight of authority and a question of Federal Law which has not been but should be settled by this Court; in Point 3 a question of general law in conflict with the weight of authority; in Point 4, a question of Federal Law, which has not been but should be settled by this Court; and in Point 7, a question of general law, in conflict with the weight of authority.

Not a single reason has been adduced for granting the writ of certiorari in this case. The motive for this application is delay and more delay, and this is made manifest by the history of this controversy now drawn out to the extent of twenty-one years—to use Lord Thurlow's vivid expression, "to pluck the last hair from the tail of procrastination."

We now pass to the "Brief in Support of Petition."

After referring to the two cases below, pages 15 and 16, District Court opinion, and U. S. C. C. A. opinion, petitioners set out the "Grounds on which jurisdiction of this Court is invoked."

Under paragraph 2 of this head are set out "The specific claims advanced and rulings made in the lower court which are relied upon as a basis of this Court's jurisdiction." Then under paragraphs (a) to (f), both inclusive, pages 16 and 17, are set out the specific claims advanced by petitioners in the Court of Appeals.

The two first points, (a) and (b), viz., laches and meaning of decree, have been abandoned in the brief. The next points are: (c) Denial that the Railroad Company became trustee ex maleficio by collecting the "freight charged at the rates then legally in effect"; (d) denial that intervener could invoke the trust-fund doctrine; (e) the assertion that said trust-fund theory was inconsistent with and abrogated by the Commerce Act, and by the exclusive remedies for collection by reparation prescribed by that act; (f) that interveners' claims were not a preferred debt

of the railroad company, and, if allowable at all, could only be established as general unsecured creditors' claims.

On page 17 of petitioners' brief, paragraphs 1 to 6, both inclusive, are set out the alleged rulings of the Circuit Court of Appeals.

Paragraphs 1, laches, and 2, meaning of the decree, are not argued in the brief, and are therefore presumably abandoned. Paragraphs 3 to 6, both inclusive, are substantially the same as paragraphs 3 to 6, pages 9 and 10 of the petition, analyzed and discussed, supra, and contain the same errors of fact, viz., omissions of essential facts above pointed out, and constitute, we believe, a very distorted statement of the holdings of the Court of Appeals. Nothing is easier than to convict a court of error by asserting an abstract holding and not giving the essential facts upon which that holding is based. It is easy to knock down a straw man.

On page 18 of the brief is set out, under paragraph 3, the statutory provision under which this Court's jurisdiction is invoked, Section 248 of the Judicial Code, as amended February 13, 1925, and under paragraph 4, page 18, cases believed to sustain the jurisdiction of this Court, four in number, all of which will be discussed, infra, under the Argument.

### "STATEMENT OF THE CASE" (Page 19) IN BRIEF.

The statement adopts the statement in the petition.

It is followed by "SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED," page 19.

The specification of errors contains eight grounds. Paragraphs 5, as to laches, and 6, as to the meaning of the decree, are presumably abandoned in the brief, as pointed out supra, and will not be argued.

Points 1, 2, 3 and 4 are an abbreviation of points 1, 2, 3 and 4 under the head, "REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI," pages 10 and 11 of the petition, all of which have been heretofore discussed, and contain even in a larger degree omissions of important matters of fact, found in the opinion of the U. S. C. C. A., and pointed out supra, and are all predicated upon misconceptions of the holdings of the court below.

Points 7 and 8, page 19, are the same as point 7, page 12, of the petition, under the head, "REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI."

Following the Specification of Errors is the Argument, under five heads, pages 20 to 35, both inclusive.

# ARGUMENT.

I.

In the Brief of the argument counsel for Petitioners, in substance, makes the same points that are set out in "Reasons Relied on for Allowance of the Writ of Certiorari." In the first point they contend that the decision of the Circuit Court of Appeals held that the collection of legally-established rates becomes wrongful and unlawful because such rates are subsequently found by the Commission to be unjust and unreasonable and such holding is in conflict with the applicable decisions of this Court.

This is an erroneous statement of the decision and holding of the Circuit Court of Appeals. The Circuit Court of Appeals did not hold that the rates became wrongful and unlawful because such rates were subsequently found by the Commission to be unjust and unreasonable. The Circuit Court of Appeals decided and held that these rates to the extent of 3 cents a hundred pounds were wrongful and unlawful, because they were unjust and unreasonable at the time they were collected. The Circuit Court of Appeals did not hold that the rates became unlawful because the Commission found them unjust and unreasonable either before or after they were collected, but because they were unjust and unreasonable.

The Circuit Court of Appeals held that they were ipso facto unlawful, because to the extent that they were unjust and unreasonable they were unlawful both at common law and under section 1 of the act itself.

The actual holding and decision of the Circuit Court of Appeals is not in conflict with the decisions of this Court, but is in harmony with the decisions of this Court and with the Act to Regulate Commerce itself.

Section 6 of the act was enacted to insure uniformity and to prevent discrimination of all kind, and, of course, we concede that, so long as the rate remains a published rate, the carrier must collect it and the shipper must pay it. But, because this is true, it by no means follows that a published unjust and unreasonable rate is a lawful rate.

Section 1 of the Act (effective in 1905) provided:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property, as aforesaid, or in connection therewith, or for the receiving, delivering and handling of such property shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful" which was declaratory of the common law. (Bold-face type ours.)

In all the earlier cases for reparation before the Interstate Commerce Commission the carriers made the contention that reparation could not be ordered because the carrier, when it collected the published rate, was collecting the legal rate, and, therefore, had a right to retain everything it collected under the published tariff, because when it collected the legal rate it obtained complete title to the entire amount collected.

It will be interesting to note how the Interstate Commerce Commission disposed of that contention. In the case of Arkansas Fuel Co. v. C. M. & St. P. Ry. Co., 16 I. C. C. Reports, p. 97, the Commission said:

"It has been said that the word 'legal' looks more to the letter and 'lawful' to the spirit of the law; that 'legal' imports rather than the forms of law are observed and the rules prescribed obeyed, and the word 'lawful' that the act is rightful in substance. The two words may aptly be used as illustrative of the distinction that we have attempted to draw in the cases cited. It is provided in section 6 of the act that no carrier shall collect or receive a greater or less compensation than the rates specified in the tariff in effect at the time of the movement. Other provisions of law make it a misdemeanor for the carrier to depart from the published rate. In dealing with shippers the carrier is therefore required to conform the freight charges actually collected to the amount fixed in its published tariffs. In that sense the published rate in effect at the time of the movement is, therefore, the legal rate. It is what the letter of the law requires the shipper to pay and the carrier to collect.

"But the first section of the act, following the rule of the common law, declares that all charges for services rendered by a carrier in the transportation of passengers or property shall be reasonable and just. It also declares every unjust and unreasonable charge for such a service to be unlawful. In publishing a rate or schedule of rates the carrier therefore acts under this admonition of the statute. \* \* \* While it may be, and indeed is, the legal rate—the rate that must be paid by the shipper and collected by the carrier because it is the published rate—the mere publication cannot make a rate lawful that is unreasonable and excessive."

The underlying and basic idea of reparation is that the collection of an unjust and unreasonable rate is unlawful. If it were not unlawful, then the carrier, when it collected it, would obtain both the legal and equitable title to the unjust and unreasonable rate and could hold it as against the shipper and as against the world.

This holding of the Circuit Court of Appeals, instead of being in conflict with the decisions of this Court, has been sustained many times by this Court. In the case of Southern Pacific Company v. Darnell-Taenzer Co., 245 U. S. 531, the excessive freight charge had been passed on by the shipper to the consumer, and it was contended by the reilroad company that the shipper had suffered no loss. This Court said:

"The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. \* \* \* THE CARRIER OUGHT NOT

TO BE ALLOWED TO RETAIN HIS ILLEGAL PROFIT, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum." (Black caps ours.)

If the exactions had not been unlawful, the claims could not have accrued at the time the exactions were made. The carrier receives the "illegal profit" when the exaction is made.

In the case of Mills v. Lehigh Valley R. R. Co., 238 U. S. 473, the Interstate Commerce Commission found that the shipper was entitled to the excess charges as reparation. It was contended by the railroad company in this case that this was not a finding that the shipper had been damaged. The Court said on page 481 of the opinion:

"What the Commission decided was that the shippers were entitled to reparation; that is, to be made whole, to be compensated for a loss because of an illegal and unreasonable exaction \* \* \*."

In the case of Phillips v. Grand Trunk Ry. Co., 236 U. S. 662, a recovery was denied because suit had not been filed within the time fixed by the statute. The Court said, on pages 665-6:

"But while every person who had paid the rate could take advantage of the finding that the advance was unreasonable, he was obliged to assert his claim within the time fixed by law. When the overcharge was collected a cause of action at once arose and the shipper at once had the right to file a complaint or to intervene in proceedings instituted by others."

The cause of action at once arose because the exaction was unlawful, at the time it was made.

The Circuit Court of Appeals, in the case of Darnell-Taenzer Co. v. Southern Pacific, 221 Fed., l. c. 894, which came to this Court and was decided in Southern Pacific Company v. Darnell-Taenzer Co., 245 U. S., supra, said:

"Cases of excessive and unreasonable rates differ from discriminating charges in the fact that in the latter there is nothing unlawful in the charging and receiving of the higher or published rate on which the demand for reparation is based; the unlawfulness is in giving a lower rate to someone else. On the other hand, the charging of an excessive and unreasonable rate is ipso facto unlawful."

In the case of Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, the Court said:

"Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints for awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force."

Of course, a wrong cannot be unlawfully suffered, if the act which causes the wrong is a lawful act.

This Court, in the recent case of Louisville & Nashville R. R. Co. v. Sloss-Sheffield Steel and Iron Co., U. S. S. C. Advance Opinions, Law Ed. 4, December 15, 1925, page 94, l. c. 101, held "the tariff rate, although unlawful because excessive, was, as between the shipper and carrier, the only legal rate." (Bold-face type ours.)

All of these cases of this Court were reparation cases and all of them hold that the exaction of an unjust and unreasonable rate is an unlawful exaction and unlawful at the time it is made. As the Master well said in his report (Rec., p. 165):

"It can make no difference that in the interest of uniformity a shipper, before he can bring his action to recover, must secure a finding of the extent to which the rate is unreasonable and unjust. The basic act itself is unlawful. The prescribed procedural steps cannot affect the situation."

The procedural steps provided to determine the extent to which a rate was unjust and unreasonable were prescribed by Congress to insure uniformity.

The cases from this Court, cited by Petitioners, in support of their proposition, are not in conflict with the

holding and decision of the Court of Appeals on this point, as a brief analysis will demonstrate.

In the case of Pennsylvania Railroad Company v. International Coal Mining Company, 230 U.S. 184, the shipper was attempting to recover, first, the amount of the difference between the rebate allowed to the plaintiff and the amount of the rebate allowed to another shipper; and, second, the difference between the tariff, or published rate, and the tariff, or published rate, less the rebate made to another shipper. The Court held that as to the first attempted recovery the parties were particeps criminis and that they would be left where they were. On the second proposition the Court held that the amount of the difference between the tariff rate and the tariff rate, less the rebate allowed the other shipper, was not evidence of the amount of the plaintiff's loss, and that, since he had not made any other proof of loss, there could be no recovery. The question as to whether or not a published, unjust and unreasonable rate was unlawful at the time of its collection was not before the Court at all, and the Court simply announced the familiar doctrine that a published rate was the legal rate in the sense that it was the only rate that could be charged by the carrier and collected from the shipper.

As we have already seen, the case of Texas and Pacific Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, where it considers the point involved here, ruled that the application of unreasonable schedules during the period, when such

schedule was in force, afforded the shipper grounds for legal complaint and a recovery for wrongs unlawfully suffered from such application.

However, the real point decided in the Abilene Cotton Oil Company case was that, in order not to destroy one of the objects of the Act to Regulate Commerce, which was to secure uniformity and to prevent discrimination of all kinds, the shipper must first go to the Interstate Commerce Commission to have the extent to which any given rate is unreasonable, established.

The case of Robinson v. Baltimore & Ohio Railroad Company, 222 U. S. 506, involved a question of whether a shipper could sue the carrier direct to recover the excess which he claimed to have paid under a rate attacked as unjustly discriminatory. The Court quoted at length (l. c. 510-511) the famous Abilene Cotton Oil case, supra, holding that such right on the part of the shipper would be inconsistent with the purpose of the act and followed the rule there announced. The quotation from this case in Petitioners' brief (p. 22) stops at a very convenient point. They have put a period after the word "effect." In the opinion a comma follows the word "effect," and the rest of the sentence is as follows:

"" \* " invested the Interstate Commerce Commission with authority to receive complaints against rates so established, and to inquire and find whether they were in anywise violative of the prohibitions of the act, and, if so, what, if any, injury had been

done thereby to the person complaining or to others, and further authorized the Commission to direct the carrier to desist from any violation found to exist, and to make reparation for any injury found to have been done. Provision was also made for the enforcement of the order for reparation by an action in the Circuit Court of the United States if the carrier failed to comply with it."

Of course, this decision is not in conflict with the decision of the Circuit Court of Appeals. It is in harmony with that decision and the decisions, supra, of this Court.

Following this quotation in their brief (p. 22), counsel for Petitioners make an odd assertion. They say: "No order was or could have been entered by the Commission. in August, 1925, requiring a railroad company to cease and desist from collecting the rates held to be unreasonable for the future." It is true that no order was made requiring the carriers in this case to cease and desist. The finding of the Commission was that an order should be made requiring them to cease and desist from collecting the rate to the extent which the Commission had found it to be unreasonable. Undoubtedly it did not make an order requiring the carrier to cease and design from collecting the unjust and unreasonable rate because of the filing of the petition by the shippers for additional findings, but no one ever contended that the Commission did not, at that time, have power to make such an order, although it is true that the Commission did not.

at that time, have the right to fix rates, because it only got that right under the Hepburn Act, which went into effect, August 29, 1906.

The opinion of Judge Sanborn (288 Fed. 612, l. c. 629-30) is, of course, no authority for the proposition that the decision of the Circuit Court of Appeals reversing Judge Sanborn is in conflict with the decisions of this Court. Judge Sanborn's decision is clearly in conflict with the decisions of this Court.

This opinion undertakes to create an impossible conflict between Sections 1 and 6 of the Act, and then declares that "such an absurdity ought to be rejected." As often construed by this Court in cases, cited herein, there is no conflict between requiring the carrier to collect the published tariff rate and the right of the shipper to reparation for an unjust and unreasonable charge.

There is no real conflict between the decision of the Court of Appeals in this case and its decision in the case of C. B. & Q. R. R. Co. v. Merriam and Millard Co., 297 Fed. 1. In the last cited case the question involved was whether or not reparation could be recovered, in advance of a finding, or without a previous determination by the Interstate Commerce Commission, of the extent to which a rate was unjust and unreasonable. In that case the Interstate Commerce Commission had found a published rate to be unjust and unreasonable for the future and fixed a rate for the future which would be just and reasonable. There had been no determination by the Interstate Com-

merce Commission that the published rate would be unjust and unreasonable, up to the time that the new rate under the order of the Commission was to go into effect. The Court simply follows the Abilene Cotton Oil Co. case and held that, until the Commission had declared the existence of a right to reparation, an action in the courts to recover reparation could not be maintained.

In this point and in the Specification of Errors and in the "Reasons relied on for the allowance of the writ," petitioners' counsel persistently refer to the finding of the Commission made "subsequently" to the collection of these unlawful exactions. As a matter of fact, the Commission, before any of these unlawful exactions were made, to wit, August 16, 1905, had found these rates to be unjust and unreasonable and, therefore, unlawful, so that in this case the carriers continued to collect the unjust and unreasonable rate not only in the teeth of section 1 of the statute, declaring their action in that regard unlawful, but in the teeth of a positive and unequivocal finding of the Interstate Commerce Commission.

### II.

In the second point of their brief of the argument counsel for the Petitioners combine the second and third "Reasons Relied on for Allowance of Writ of Certiorari" and the second and third points in their Specification of Errors. They say in the second point that the decision of the Circuit Court of Appeals that the railroad com-

pany became chargeable as trustee ex maleficio of the excessive charges collected by it, and that the trust fund doctrine could be invoked by the Respondents is erroneous and in conflict with the decisions of this Court, with the decisions of the same Circuit Court of Appeals and with the decisions of other Circuit Courts of Appeal on the same matter.

It should be borne in mind that this contest is really between the shippers on the one side and the railway company on the other. The stockholders of the old rail. road company, under the findings of the Master (Rec., p. 147) and under the findings of the Circuit Court of Appeals (Rec., p. 702) received over \$45,000,000.00 par value of the stock of the new railway company without paying anything therefor. The Circuit Court of Appeals (Rec., p. 718) said it is established by the record here that at all times after the excessive freight charges were collected and down to the receivership the railroad company had in its treasury money in excess of the claimed overcharges and that it turned over to the Receivers some \$300,000.00 and that under the doctrine of the Love case it will be presumed that the money exacted by duress from the intervenors and their assignors for unjust and excessive freight rates was a part of the money in the treasury of the company which passed to the Receivers. No one else claimed any part of the \$300,000.00 so turned over to the Receivers by the railroad company except Love, the complainant in the case of Love et al. v. North American Company et al., 229 Fed. 103. His Honor, Judge Sanborn, decided that Love was not a preferred creditor. This same Circuit Court of Appeals reversed the decision of Judge Sanborn and held that Love was a preferred creditor and the petitioners paid the judgment directed in favor of Love by the Circuit Court of Appeals, but after this payment there was still at all times in the hands of the Receivers over \$300,000.00 and turned over by them to the new Railway Company, a sum greatly in excess of the claims of Respondents. The Circuit Court of Appeals in this case followed the Love case, pointing out that there was no substantial distinction between this case and the Love case. The facts in this case, found by the Circuit Court of Appeals and by the Master, are that the railroad company commingled the moneys unlawfully exacted from the shippers with their own. From the time of the first unlawful exaction, down to and including the date of the appointment of the Receivers, the railroad company had in its treasury a sum largely in excess of the claims of these respondents plus the claim of the complainant in the Love case. It was contended by counsel for petitioners in the Circuit Court of Appeals that because respondents did not trace every dollar of the illegal exactions into this bank or that bank and did not show that it remained there, they had not traced their money. The railroad company did deposit their funds in several different banks, but, suppose they had kept their money in several different boxes today, one day taking money out of one box and paying it out and another day taking money out of another box and paying it out, but always having in their boxes a sum in excess of the trust fund, would not the presumption be indeed that the railroad company had acted honestly and had paid out its own money, leaving in the boxes money belonging beneficially to respondents? What the Circuit Court of Appeals did in this case was to treat all of the boxes as one box. It held that since the railroad company always had in its treasury an amount in excess of the trust fund, the trust could be enforced on such excess. This decision properly understood is not in conflict with the decisions of this Court or with the decisions of the Courts of Appeals.

In the case of Angle v. Chicago, St. Paul & C. Rwy. Co., 151 U. S. 126, this Court said it is familiar doctrine that the party who acquires title to the property wrongfully may be adjudged a trustee ex maleficio in respect to that property.

In the case of Mercantile Trust Co. v. St. Louis & San Francisco Rrd. Co., 69 Fed. 193, which arose under an earlier receivership of this railroad, the Court, in that case (p. 197), said of this situation:

"Two-fifths of all the money that went into the treasury of the company for fares of passengers represented unlawful and illegal exactions. That money it still has. No portion of it has been returned to the persons who were illegally forced to pay it. The sums illegally exacted from the interveners have never been

returned or tendered to them. It required eight years of litigation for the interveners to establish their own and the rights of the public in the premises. When, as sometimes happens, a railroad company desires to avoid the payment of debts and obligations incurred in the operation of its road, or to reduce the wages of its employes below a fair and reasonable compensation for their services-there are not many such companies, but occasionally there is one-it seeks the aid of a friendly creditor, through whose agency it is quickly placed in the hands of a receiver, and immediately a court of equity is asked and expected to do the mean things which the company itself was unable or ashamed to do. But it is believed this is the first instance in which a court of equity has been asked to become, in effect, something bordering very closely on a receiver of stolen goods, and urged to hold the ill-gotten gains in trust for the guilty party. and refuse to make restitution even of the smallest portion of them to the persons from whom they were unlawfully taken. High considerations of public policy, not less than the plainest principles of equity and justice, demand that the property of the defendant company in the custody of the Court as a trust fund should be made to respond to the payment of these judgments."

Also vid Richardson v. New Orleans Debenture Redemption Co., 102 Fed., p. 785 (C. C. A. 5th Cir.).

In commingling this trust money with its own money, the Railroad Company violated its duty as trustee, and the courts, in order to correct this situation, indulge every presumption for the beneficiary. The proposition that no such narrow doctrine as that contended for by counsel for petitioners exists is shown by the case of Terre Haute and I. R. Co. v. Cox, 102 Fed. Rep. 825 (U. S. C. C. A. 7). In that case the Railroad Company commingled the trust fund with its own in its treasury. The Court said:

"But it is insisted by the Indianapolis Company that the excess of operating expenses over the earnings of the Peoria Railroad necessitated and justified the withholding of the thirty percentum, and the record shows that a large sum of money came into the hands of the Receiver as a part of the estate at the time of their appointment. We may, therefore, we think, safely assume that that portion of the earnings which otherwise would have gone to the Peoria Company came into the hands of the Receivers, either as money at the time they took possession of the road, or as a benefit in virtue of the fact that they were consumed in the general operating expenses of the Indianapolis Company."

The Court, in this last-cited case, quoted from Peters v. Bain, 133 U. S. 670, 33 L. Ed. 696. Formerly the equitable right of following misapplied money or other property into the hands of parties receiving it depended upon the ability to identify it. The equity attached only to the very property misapplied. This right was first extended to the proceeds of the property, viz., to that which was procured in place of it by exchange, purchase or sale, and if it became confused with other property of the same kind

so as not to be distinguishable without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as a better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving the party injured by the unlawful conversion a priority of right over the other creditors of the possessor in this case; that, when the railroad company commingled these unlawful exactions with their own money, the shipper's equity became a charge upon the entire mass in the treasury of the company. It makes no difference that part of the money may have been deposited in one bank to the railroad's credit and part in another. No matter how many banks it may have been deposited in, the railroad company remained in control of it and, at all times, the money was in the treasury of the railroad company, as was held by the Circuit Court of Appeals. The narrow contention of counsel for petitioners would take us back to the old rule that every dollar had to be earmarked. The Circuit Court of Appeals, in the case of Terre Haute I. R. Co., supra, said:

"Clearly, then, the Indianapolis Company in its own right could not oppose the restoration of these moneys to the Peoria Company."

The railroad company clearly in that case could not oppose the restoration of these moneys to the Peoria Company and neither can the railway company in this case to respondents. Not only did the amount in the treasury,

from the time these unlawful exactions were made, exceed the trust fund; not only did the railroad company turn over to the Receivers a sum greatly in excess of these unlawful exactions from its treasury, but there never was a time, after the appointment of the Receivers, that the moneys in their treasury did not greatly exceed the trust fund, as was found by the Master and the Circuit Court of Appeals. The Receivers turned over to the railway company over \$5,000,000.00, after paying all operating charges, all taxes, interest on bonded indebtedness and after taking up car trust certificates issued before the receivership.

The above principles were declared in the leading case of Central National Bank of Baltimore v. Connecticut Mutual Life Insurance Co., 104 U. S. 54, 26 Law Ed. 693, in which the syllabus was written by Mr. Justice Matthews, the author of the opinion. The syllabus (paragraph 3, page 694) is as follows:

"That, so long as trust property can be traced and followed into other property into which it has been converted, the latter remains subject to the trust, and that if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own, are established doctrines of equity and apply in every case of a trust relation, and to moneys deposited in a bank account, and the debt thereby created, as well as to every other description of property."

This proposition is discussed in the opinion, 26 Law Ed., l. c. 699-701. The Court reviews the English cases on this subject and points out that the original doctrine, requiring money to be earmarked, or specifically identified, had been abandoned in cases of trust relationship. The Court cites the opinion of Vice-Chancellor Sir W. Page Wood, as follows (l. c. 699):

"Vice-Chancellor Sir W. Page Wood, in Frith v. Cartland, 2 Hem. & M. 420, said that Pennell v. Deffell rested upon and illustrated two established doctrines. One was that 'So long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust.' The second is, 'That if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own.'"

Again the Court said (l. c. 700) (after quoting the opinion of the Master of the Rolls, Sir George Jessell, as set out in the rule announced in the headnote above):

"He adopts the principle of **Lord** Ellenborough's statement in **Taylor v. Plumer**, 3 M. & S. 562, that 'It makes no difference in reason or law into what other form different from the original the change may have been made, whether it be into that of promissory notes for the security of money which was produced by the sale of the goods of the principal, as in **Scott v. Surman**, Willes 400, or into other merchandise, as in **Whitcomb v. Jacob**, 1 Salk. 161, for the product or

substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail.' But he dissents from the application of the rule made by Lord Ellenborough when the latter added, 'which is the case when the subject is turned into money and confounded in a general mass of the same description,' for equity will follow the money, even if put into a bag, or an undistinguishable mass, by taking out the same quantity. And the doctrine that money has no earmark must be taken as subject to the application of this rule. The Court of Appeals had previously applied the very rule as here stated in the case of Birt v. Burt, reported in a note to Ex parte Dale & Co., L. R., 11 Ch. D. 773."

The Court further added that the principles, above enunciated, had been illustrated by many cases in the United States, eiting and analyzing a number of such cases, l. c. 700.

This case on this point has been cited and followed by this Court, by the lower federal courts and by nearly all of the state courts. It would be useless to attempt to give this vast mass of citations, but, in addition to the cases of Cox and Richardson, above quoted, citing and following this case, we refer to the two following cases: Smith v. Township of Au Gres, 150 Fed. 257, l. c. 260-265, 9 L. R. A. (n. s.) 876, and 80 C. C. A. 145 (6th Circuit). This case contains an excellent discussion of the doctrine, above announced, and quotes (l. c. 261) from the opinion

of Chancellor Kent in Hart v. Ten Eyck, 2 Johns. Ch. 62, l. c. 108, as follows:

"If a party having charge of the property of others so confounds it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property, or lose it."

This is as strong a statement of the rule of presumption as can be found on this subject and amply supports the presumption invoked both in the Love case and in the instant case.

The case of Standard Oil Company of Kentucky v. Hawkins (C. C. A., 7th Circuit), 74 Fed. 395, l. c. 395-402, reviews the authorities on this subject and cites and follows the rule announced in the Central National Bank case, supra. The Court traces the history of this doctrine, citing the English authorities and their application in the American decisions. The Court cites (l. c. 401-2) the opinion of Mr. Justice Bradley in Frelinghuysen v. Nugent, 36 Fed. 229, 239, which language is quoted with approval in Peters v. Bain, 133 U. S. 670, 693, in which he points out and disapproves the old equitable doctrine as to the necessity of exact identification of a trust fund or trust property commingled with others, and adds:

"Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor."

The Court (l. c. 402) cites numerous cases, announcing the same proposition, and states that the Central National Bank rule had been followed in Peters v. Bain, 133 U. S. 670.

The principles above stated have an even stronger application to the facts in the instant case, because in the cases above quoted the trust doctrine arose out of conventional agreements of the parties, whereas, in the instant case the money of the shippers was extorted under duress and under the compulsion of the statute, and, under the theory of the Reparation Provision of the Commerce Act, constituted a trust fund, which must be restored to the shipper.

In the case of Smith v. Mottley, 150 Fed. 266 (C. C. A., 6th Circuit), l. c. 268, the Court again discusses the commingling of trust funds and the rights of the beneficiary. The Court refers to the Au Gres case, decided by it (150 Fed. 267), and reannounces the same doctrine, citing additional cases in support thereof.

The Court said (l. c. 268) that it was shown that three times the amount of the trust fund claimed remained in the bank from the time of payment to the time of the assignment and came to the trustee. The Court added:

"The burden of showing that his property has been wrongfully mingled in a mass of the property of the wrongdoer is upon the owner; but, when this is done, the burden shifts to the wrongdoer. It is for him to distinguish between his own property and that of the innocent party" (citing a number of cases).

The cases cited by counsel for petitioners are not in conflict with the decision of the Circuit Court of Appeals in the instant case. When the different states of facts are considered, those cases are in harmony with the decision of the Circuit Court of Appeals.

In the case of City of Litchfield v. Ballou, 114 U.S. 190, 29 Law Ed. 132, the city had issued bonds which this Court held to be void, because they were issued in violation of the state Constitution. Thereupon, the purchaser of the bonds brought a suit in equity on the theory that, notwithstanding the bonds were wholly invalid, the city was in possession of the money, received for the bonds, or its equivalent in property identified as having been procured with the proceeds of the bonds. The evidence showed that the money represented by the proceeds of the bonds had long since passed out of the hands of the city. However, the evidence showed that some of the proceeds of the bonds had gone into a water works plant. A large part, however, of the money, which had gone into the water works plant, was obtained by taxation, or from other resources of the city. It was not ascertainable how much. The land, on which the work was constructed, was

purchased before the bonds were issued. The streets, through which the pipes were laid, were public property into which no money of the complainants had entered. In connection with the allegations in the bill that the city was in possession of the money, the Court said (l. c. 133):

"The money received by the city from Ballou has long passed out of his possession and cannot be restored to complainant. Neither the specific money nor any other money is to be found in the safe of the city or anywhere else under its control."

Speaking about the tracing of the money into the water works property, this Court used the language set out in petitioners' brief. In this case respondents have traced their money into the treasury of the railroad company and from the treasury of the railroad company into the hands of the Receivers, and from the hands of the Receivers into the hands of the railway company, and have showed that the stockholders of the old railroad company obtained over forty-five million (\$45,000,000.00) dollars of the stock of the new railway company without paying anything for it.

Here respondents' money can be reclaimed and delivered without taking others' property with it and without injury to other persons, or interfering with others' rights. Moreover, the decree of the lower court appealed from in this Ballou case did not proceed upon the trust fund theory. It found a debt from the city to Ballou and

impressed a lien upon the water works plant for the payment of that debt. This Court held that that was as much within the condemnation of the constitutional provision as the express contracts evidenced by the bonds.

The case of Schuyler v. Littlefield, 232 U. S. 707, 58 Law Ed. 806, simply announces the familiar doctrine:

"Trust funds deposited by a trustee in his individual bank account are dissipated if the mingled fund is at any time wholly depleted, and cannot be treated as reappearing in sums subsequently deposited to the same account."

The next case cited is Empire State Surety Co. v. Carroll County, 194 Fed. 593 (U. S. C. C. A., 8th Circuit).

In this case Judge Sanborn (l. c. 604-605) undertakes to announce the rules governing the enforcement of a trust against the proceeds of an insolvent estate in the hands of a receiver. After announcing the general rule:

"It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof which came to the hands of the Receiver" (citing l. c. 604 and a number of cases),

the Court stated (l. c. 605) the second rule on this subject, which is as follows:

"Proof that a trustee mingled trust funds with his own and made payments out of the common fund is a sufficient identification of the remainder of that fund coming to the hands of the Receiver, not exceeding the smallest amount the fund contained subsequent to the commingling (Board of Com'rs v. Strawn, 157 Fed. 49, 51, 84 C. C. A. 553, 555, 15 L. R. A. [n. s.] 1100; Weiss v. Haight & Freese Co. [C. C.], 152 Fed. 479; American Can Co. v. Williams, 178 Fed. 42, 423, 101 C. C. A. 634, 637) as trust property, because the legal presumption is that he regarded the law and neither paid out nor invested in other property the trust fund, but kept it sacred (Board of Com'rs v. Patterson [C. C.], 149 Fed. 229, 232; Spokane County v. First National Bank, 68 Fed. 979, 16 C. C. A. 81)."

This rule fits the facts found in the instant case, viz., the \$300,000.00, at all times held by the carrier, the Receivers and successor, and accords with the finding of the Circuit Court of Appeals in this case (Rec., p. 718), that the excess freight rates collected by the carrier were part of the moneys in the treasury of the company, which passed to the Receiver.

The next case cited is the case of Winfield v. Alva Security Bank, 232 Fed. 847 (U. S. C. C. A., 8th Circuit). In this case the complainants had purchased forged notes from the cashier of the Alva Bank. The complainants had credited the Alva Bank with the purchase price of these notes. Subsequently, these credits were entirely exhausted by drafts and there was no evidence that any part of the fund ever reached the Alva Bank. What was said by the

Court in this Alva Bank case, after finding that there was no evidence that any of the proceeds of the forged notes ever reached the bank, may have been right on the facts in that case, but is not authority on the facts in this case. Whatever may have been the principles announced in that case, they are clearly inapplicable to a reparation case like this, the principles governing which have been stated by the United States Circuit Court of Appeals in this and the Love case. Certainly the robust morality of the opinion of the United States Circuit Court of Appeals in the instant case must appeal to all fairminded persons. One of the deep-seated convictions of Congress, as reflected by its legislation, namely, the Carmack Amendment, and the Elkins Act, designed "to cut up by the roots every form of discrimination, favoritism and inequality" (U. S. v. Koenig Coal Co., U. S. S. C. Adv. Opinion, May 1, 1926, No. 12, p. 488, l. c. 490), and by the provisions of the Commerce Act, was to protect the shipper in the wholly unequal fight with the carrier. It is very easy for the carrier to get the shipper's money, and Congress, as shown by its legislation, as construed by this Court, is determined that the shipper shall get it back, and has even gone to the extent of authorizing the assessment of attorneys' fees in favor of the defrauded shipper. It is the clear intent of Congress, as shown in the Commerce Act, to restore to the shipper all unjust and unreasonable charges, plus interest from the date of payment, and attorneys' fees, thereby penalizing the carrier and predisposing the carrier to treat the shipper fairly and not litigate his just claims with him, in season and out of season, day and night, Sundays and holidays, for a period of twenty-two years, during which time an opportune financial receivership is invoked to entirely defeat the shipper, though the stockholders of the railroad company in receivership are enriched at the expense of its creditors to the extent of over forty-five millions of dollars.

The next case cited is the case of Federal State Bank v. McFarlin, 257 Fed. (U. S. C. C. A. 8th Cir.).

This case involved the distribution of assets of a bankrupt grain company and merely announces the general proposition, citing the Carroll Company and Alva Bank cases, supra, that a claimant, whose property has helped to swell the general assets of a party, subsequently becoming bankrupt, has no prior right in those general assets without specific identification or tracing of the claimant's property.

There was no proof that a large fund claimed by no one except the interveners was carried at all times by the zankrupt company, both before and after bankruptcy.

The next case cited, Scullin Steel Co. v. North American Co., 255 Fed. 945 (U. S. C. C. A., 8th Circuit), merely announces the proposition that, where there is collusion and fraud between the agent of the shipper and the agent of the carrier, and the carrier had no notice of such fraud and was not enriched by it, the money so siphoned from

the shipper could not be treated as a preferred claim over other creditors of the carrier.

The next case cited is Weideman v. Newton Arms Co., 271 Fed. 302, 304 (C. C. A., 2nd Circuit), in which the Court held that, where a trust claim was asserted on the ground that money had been secured from claimant by the false representations of a corporation, it was necessary to show, first, that such representations were relied on, and, second, trace their money into some particular property or fund which came into the hands of the Receiver; and it is not sufficient to show that it was used by the corporation generally in its business.

In that case the Court pointed out (l. c. 303) that the cash on hand had fluctuated down to zero, with liabilities of \$400,000.00, and that all that claimants could prove was that their money was spent in carrying on the business or procuring certain articles of machinery and the like, which ultimately passed into the Receiver's hands (l. c. 304).

How can this holding fit the facts in the instant case?

The next case cited is Titlow v. McCormick, 236 Fed. 209, l. c. 214, 215. This case involved the distribution of the assets of an insolvent bank, where a trust was asserted by one claimant. This case cites and follows (l. c. 211) the Schuyler case, 232 U. S. 707, analyzed supra. This case also announces the doctrine (l. c. 214) that, where a trust fund has been commingled with other funds, still claimant is entitled to recover if there remained in the possession of the bank a sum of money equal to the amount due him,

"IT BEING THE PRESUMPTION OF THE LAW THAT. IF MONEYS HAD BEEN DISBURSED OUT OF SUCH FUND, IT WAS THE MONEY WHICH THE BANK HAD THE RIGHT TO PAY OUT, AND NOT THE MONEY WHICH WAS ENTRUSTED TO IT IN A FIDUCIARY CAPACITY." (Black caps ours.) Again. l. c. 215, the Court announces the same rule, quoting the case of Brennan v. Tillinghast, 201 Fed. 609-614 (C. C. A. 6th Circuit), where the Court declared that, when trust funds were mingled with other funds there was a presumption of law "THAT THE SUMS FIRST DRAWN OUT WERE FOR THE MONEYS WHICH THE TORT FEASOR HAD A RIGHT TO EXPEND IN HIS OWN BUSINESS, AND THAT THE BALANCE WHICH RE-MAINED INCLUDED THE TRUST FUND WHICH HE HAD NO RIGHT TO USE." (Black caps ours.)

In the Titlow case the Court applied this principle and established a trust to the extent of the unexpended deposit.

In the instant case, we repeat, there was always over \$300,000.00 in the treasury of the carrier upon which interveners' trust lien remained, and which was not dissipated in any manner, and upon which no other claimant asserted rights.

The last case cited on this point is the case of U. S. National Bank of Centralia v. City of Centralia, 240 Fed. 93 (U. S. C. C. A., 9th Circuit). This case involved the

distribution of the assets of an insolvent bank in a receiver's hands, and announces (l. c. 95) this proposition:

"The law impresses a trust upon funds (trust funds so misapplied, that is commingled with other funds) and to the extent that the said money or any portion thereof, either in its original or a substituted form, can be traced into the fund which came into the possession of the Receiver, the appellee is entitled to a preference over the general creditors" (citing the Titlow, Schuyler and Brennan cases, supra).

The Court held in the Centralia case that there was no proof that claimant's moneys ever came to the Centralia bank or were traceable to any fund that came to the Receiver's hands, and, therefore, there could not be any recovery upon the trust theory. How this case applies to the facts of the instant case, we cannot conceive.

Since the provisions of the Commerce Act require uniformity as between shippers, the same uniformity is required in the enforcement of reparation—a restitution of money unlawfully taken by the carrier from the shipper. This restitution presupposes priority of payment and necessarily establishes the basis for the enforcement of the trust ex maleficio doctrine, when a carrier, owing reparation to a shipper, has gone into the hands of a receiver. If this were not true the basic uniformity required by the Commerce Act would be destroyed, because the solvent carriers, participating in the collection of an unlawful rate from the shipper, condemned by the act as unjust and

unreasonable, would be forced to make restitution: whereas, the carrier in the hands of a receiver, administered by a court of equity, would appropriate the reparation due the shipper, and thereby create a preference and advantage to the carrier in the hands of a receiver and a discrimination against the shippers on such road. No wonder that Judge Caldwell, in the case of Mercantile Trust Company v. St. Louis and San Francisco Railroad Co., above quoted, 69 Fed. 193, l. c. 198, indignantly denounced such effort of the carrier (a prior receivership of this same railroad company) to escape reparation liability via the receivership route. The Commerce Act is just as applicable, as shown by its provisions, to carriers, operated by receivers, as to the corporation performing the carrier's service, and the same equality of duties, responsibilities and uniformity of rates applies under the provisions of the act to the receiver of the carrier as to the carrier not in receivership. As to the general obligation of the receiver to pay claims and do exact justice as to a preferred claimant, asserting a trust, vid. Standard Oil Co. v. Hawkins, 74 Fed. 395, l. c. 402.

The receiver of a carrier cannot in equity be the agency to accomplish prohibited discrimination and the destruction of the basic uniformity in rates, prescribed by the act, by refusing to recognize a reparation order of the Commission, affirmed by the judgment of this Court. It is because of the rule of uniformity that the proceeding to have the rate declared unreasonable, therefore unlaw-

ful, with consequent reparation to the shipper, is not a proceeding of a private nature, but of a public nature, so as to afford the foundation of an order for repayment to all shippers affected, though not parties to the proceeding.

Baer Bros. Merc. Co. v. D. & R. G. R. R. Co., 233
U. S. 479, l. c. 486-7, 58 Law Ed. 1055, l. c. 1060;
Phillips v. Grand Trunk R. R. Co., 236 U. S. 662,
l. c. 665, 59 Law Ed. 774, l. c. 776.

The whole effect of Petitioners' argument is that there is no basis for the application of the trust ex maleficio doctrine because of the alleged fact that the excess charges were "lawfully" collected from the shippers, because under the published tariff. We have shown by repeated decisions of this Court that this contention is an obvious fallacy and the collection of such unjust and unreasonable charges is not and could not be "lawful," because such holding would destroy the basic right to reparation. With this fallacious premise exploded, it is not denied by petitioners that a trust ex maleficio did arise.

The chief remaining question, therefore, is whether or not there has been a sufficient identification and tracing of the excess charges, paid by the shippers, to authorize their recovery in the manner and form decreed by the United States Circuit Court of Appeals, and this is discussed fully, supra.

# ALLEGED CONFLICT WITH PRIOR DECISIONS OF THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Two of the grounds advanced for the granting of the writ of certiorari is that the decision of the Circuit Court of Appeals in this case is in conflict with other decisions of the same Circuit Court of Appeals, both as to the trust fund theory and identification of the fund. As we have heretofore showed, when the facts in this case are analyzed and differentiated from the facts in those other cases, there is no conflict. The case of Love v. North American Company, 229 Fed. 103, is the only case decided on facts identical with the facts in this case.

The controlling principle in the Love case is cited and approved by the opinion of the United States Circuit Court of Appeals in the instant case (Rec., p. 717), quoting from the Love case, 229 Fed. 103, l. c. 106, and in said opinion of the United States Circuit Court of Appeals in this case (Rec., p. 718) the Court adds that the Love case,

"is the latest expression of this Court on the subject, and is authority for the proposition that in order to establish a trust in a railroad company for the benefit of the shipper as to freight charges, wrongfully exacted, it is not necessary to show that the identical money received has been placed in a separate account or to trace the identical fund."

The Court further cites from the Love case (Rec., p. 717):

"The question now might be properly asked, to whom do the excessive charges received by the Frisco Company for the transportation of freight belong? They certainly do not belong to the general creditors of the Frisco Company, nor to the bondholders, nor the Frisco Company, itself. Without question they belong to the shippers. We must not be deceived as to the true status of this claim, nor allow the bond, or the fact that the claim is presented by the Corporation Commission, to blind us to the fact that the claim is one due to the shippers for excessive charges paid by them to the Frisco Company for transportation of freight. The shippers not only paid the lawful charge, but they did more. They paid an excessive charge. That payment was an illegal exaction, and, as against the railroad company, and volunteers, like the Receivers, the money belonged to the shippers after the payment the same as before. It will be presumed that it was a part of the money in the treasurer of the company which passed to the Receivers. That money came into the hands of a court of equity. What ought such a court to have done with it? Surely it could do nothing but direct that it be returned to the shippers to whom it belonged. It having been paid to the bondholders, or for permanent betterment of the property for their benefit through the agency . of a court of equity, that court, as a court of conscience, can do no less than direct its restoration."

The Court carefully considered the Carroll County case, 194 Fed. 593-604, and the various other cases, now cited by the petitioners in this application. Counsel for petitioners attempt to distinguish the Love case from this case. They made this same attempt before the Master and before the Circuit Court of Appeals and advanced the same points. The answer of the Master is found on pages 175-177 of the record. The Circuit Court of Appeals held that there was no substantial distinction between the instant case and the Love case when the same points were reargued before it. As heretofore stated, when the facts in the various cases are considered, there is no conflict between the decision of the Circuit Court of Appeals in this case and prior decisions of the same court; but conceding, arguendo, which we deny, that there is such conflict, still, under the rules of this Court, such conflict would be no ground for granting a writ of certiorari.

The Circuit Court of Appeals in this case pointed out that there was no conflict between its opinion in this case and any of its prior decisions and followed the Love case, announcing that the doctrine of the Love case was correct and should be and would be followed.

#### III.

Paragraph III of the brief, page 30, announces this proposition:

"The trust fund theory is inconsistent with, and is abrogated by, the exclusive remedy for collection of overcharges prescribed by the Act to Regulate Commerce; and the decision of the Circuit Court of Appeals that the equitable remedy is not inconsistent with the remedy by reparation is erroneous."

This proposition is discussed at length in the opinion of the United States Circuit Court of Appeals (Rec., pp. 718-721). The Abilene case is there discussed (Rec., pp. 718-719). The opinion of the District Court, 288 Fed., l. c. 630, on this point, was carefully considered by the United States Circuit Court of Appeals. The purpose of the Commerce Act and of the other acts of Congress regulating carriers, as above stated, is to give the shipper full relief in recovering excess charges, and so these acts have been construed by this Court.

The Ballou case, 114 U. S. 190-194, has been discussed supra and it is not necessary to reanalyze it.

The Keogh, 260 U. S. 156, here cited, was also cited by petitioners under the head of jurisdiction. It supports neither the jurisdictional proposition nor the question of the asserted exclusive remedy for collection of overcharges, prescribed by the Act to Regulate Commerce, which petitioners insist abrogates the trust fund theory.

In the Keogh case a suit was filed under Section 7 of the Antitrust Act, and the only question (l. c. 161) was whether there was a cause of action under section 7. The charge in that case was that the carriers had combined to fix rates for the transportation of excelsior and flax tow, and that Keogh, plaintiff, had been damaged under section 7 by such alleged combination, because deprived of the benefit of competitive rates, and that the elimination of competition had increased his rates. The Court held, through Mr. Justice Brandeis, that there was no right of action in that case, because there was nothing to show that plaintiff was damaged by the alleged combination. The Court pointed out with great care (l. c. 165):

"It (the claim of plaintiff) is not like those cases where a shipper recovers from the carrier the amount by which its exaction exceeded the legal rate (Southern Pac. Co. v. Darnell Taenzer Co., 245 U. S. 531, 62 Law Ed. 451)."

The Court again, in this case (l. c. 163), declared:

"The legal rights of shipper as against carrier in respect to a rate are measured by the published rate. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights, as defined by the tariff, cannot be varied or enlarged by either contract or tort of the carrier" (citing a number of cases).

The Court in this case, on the prior page, 162, points out what rates are legal under the Act to Regulate Commerce, and states:

"Under section 8 of the latter act the exaction of an illegal rate makes the carrier liable to the 'person injured thereby for the full amount of damages sustained in consequence of any such violation,' together with a reasonable attorney's fee. Sections 9 and 16

provide for the recovery of such damages, either by complaint before the Commission or by an action in a federal court."

From these excerpts it is perfectly apparent that the Court had in mind the distinction between the legal published rate and the rights of a shipper to recover from a carrier the amount by which its exaction exceeded the legal rate.

In the Keogh case no question of election of remedies was considered and there was no discussion of the alleged abrogation of the trust fund theory by sections 9 and 16 of the Commerce Act. The same observation applies to the Ballou case, 114 U. S. 190-194, cited under this point.

The last case cited under this point is Butler v. Western German Bank, 159 Fed. 116, l. c. 117 (U. S. C. C. A., 5th Circuit), in which the distribution of the assets of an insolvent bank was involved, and the Court held that interest was not recoverable on the fund withheld, and, also, that, where a bank, known by its officers to be insolvent, collected money for a customer and mingled the same with its own funds which, to an amount larger than the sum received, passed it to the bank's Receiver in insolvency, the customer, though unable to trace the identical money into the Receiver's hands, was entitled to recover from the Receiver an amount equal to that collected, citing and following the above-quoted case of Richardson v. New Orleans Deb. Red Co., 102 Fed. 780, based upon the Central National Bank case, 104 U. S. 54. Not one

of the above cases discusses the points involved in the instant case, or the effect of Section 22 of the Commerce Act, providing, in substance, that the remedies provided by the act shall not in any way abridge or alter the remedies now existing in common law or by statute, but the provisions of the act are in addition to such remedies.

Furthermore, not a single one of these cases discusses election of remedies or the fundamental maxims of equity governing in this case.

The fundamental basis of reparation under the Commerce Act has been discussed, supra, and no repetition is needed. The two maxims, "Ubi jus, ibi remedium" (legal), and the corresponding equitable maxim, "Equity will not suffer a wrong without a remedy," have been cited and applied innumerable times by the federal and state courts. They are two corner stones of well-ordered jurisprudence and absolutely essential to cut through the "labyrinth of technicalities" and do justice. See the following authorities:

Broom on Legal Maxims (8th Ed., p. 101 et seq.), citing the celebrated case of Ashby v. White, 2d Ld. Ryam. 953, and also the famous opinion of Chief Justice Marshall in the case of Marbury v. Madison, 1 Cr. 137, 2d L. Ed., p. 60;

Pomeroy's Equity Jurisprudence, Vol. I, Sec. 423;

Toledo, A. A. & N. M. Ry. Co. v. Penn. Co. et al., 54 Fed. 746, l. e. 751, 752;

Southern California Ry. Co. v. Rutherford et al. (Circuit Court, Southern District of California, June 30, 1894), 62 Fed., l. c. 797, 798;

Harrigan v. Gilchrist, 99 N. W. 909;

Mercantile Trust Co. v. St. Louis & San Fransisco Ry. Co., Ogden et al., Interveners, 69 Fed. 193;

Sweet v. The Montpelier Savings Bank & Trust Co., 69 Kan. 641 (77 Pac. 538);

Matthews v. Forslund, 112 Mich. 591;

Barksdale et al. v. Finney et al., 14 Grattan 338;

Williams v. Young, 81 Atlantic 1118;

Traders' Bank v. Fraser, 162 Mich. 315, l. c. 318;

Converse v. Sickles, 44 N. Y. Supp. 1080 (affirmed in 161 N. Y. 666);

Sugar Refining Company v. Fancher, 145 N. Y. 552, l. c. 561.

Some of the cases, just cited, also announce the proposition that a judgment at law is, in many cases, not such an election of the remedy as will preclude a bill in equity to impress a trust, because there is no inconsistency whatever between the two proceedings.

In conclusion on this point the case of Southern Pacific Co. v. Bogert, 250 U. S. 482, is particularly strong on the proposition that there is no election of remedies, when the relief subsequently sought is of a different character and in aid of the original rights.

Also, see on this point, the case of Standard Oil Co. of Ky. v. Hawkins, 74 Fed. 395, l. c. 397-399, in which the doctrine of election of remedies is discussed at length and it is held that resort to a prior remedy will not preclude claimant from filing a bill to impress a trust upon the fund.

Also see the reasoning of the Circuit Court of Appeals on this point (Rec., pp. 718-719), which is very convincing.

#### IV.

The fourth paragraph of the brief, page 33, announces this proposition:

"The decision of the Circuit Court of Appeals allowing interest on respondents' claims from a date subsequent to the date of appointment of the Receivers is erroneous."

The right to interest in this case, upon the reparation judgments entered, is settled by the Sloss-Sheffield case, citing many authorities and quoted, supra (U. S. S. C. Ad. Opin., Law. ed. No. 4, Dec. 15, 1925, l. c. 103).

The Receivers continued to contest the claims of respondents and continued to withhold their money from them and the railway company continued to contest the claims of the respondents and is now contesting their claims.

The Receivers stand in the shoes of the carrier and in withholding the trust fund elect to pay interest thereon, if the Court subsequently decrees that such must be returned.

The Receivers, at any time, could have terminated their obligation to restore the trust fund and their obligation to pay interest thereon by making restitution. This, likewise, is true of the new railway company, which obtained the fund from the Receivers.

Since they elected to continuously litigate a preferred claim, they must now pay interest, particularly since, as pointed out in the opinion of the United States Circuit Court of Appeals in this case, no one has any just claim to this trust fund except respondents, and, therefore, no one can be prejudiced by the payment of principal and interest.

#### V.

Point V of the brief, page 34, announces this proposition:

"The decision of the Circuit Court of Appeals that respondents were entitled to have their claims allowed as preferential claims superior to the claims of other creditors, including the bondholders, is erroneous."

This proposition is not argued in Petitioners' brief and it involves the consideration of the entire case, which is completely covered in the discussion in this brief, supra.

## CONCLUSION.

In conclusion, we believe that it has been demonstrated that no grounds for the issuance for a writ of certiorari in this case have been shown by petitioners.

The trust fund doctrine in this case is well supported by the recent decision of this Court in the case of DaytonGoose Creek Ry. Co. v. U. S., 263 U. S. 455, in which the Court construed the recapture clause of the Transportation Act and held that as to the excess the carrier never had title. Necessarily the same principle applies to excess freight rates collected under a published tariff, because prohibited by the Commerce Act as unjust and unreasonable.

We have an abiding conviction in the justice of respondents' claims, and, though the course of this long litigation would seem to indicate that at some time there had been some doubt as to the collection of these claims, and that technicalities would triumph over justice, we now feel certain that the long-delayed rights of these cattle shippers will be sustained by this tribunal and that the application for certiorari, will be denied.

Respectfully submitted,

S. H. COWAN,
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JOHN A. LEAHY,
WALTER H. SAUNDERS,
Attorneys for Respondents.



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IN THE

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

ST. LOUIS AND SAN FRANCISCO RAIL-ROAD COMPANY and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,

Petitioners.

VS.

E. B. SPILLER et al.,

Respondents.

No. 577.

MOTION OF RESPONDENTS TO ADVANCE ABOVE CAUSE ON DOCKET.

> S. H. COWAN, DAVID A. MURPHY, JOHN S. LEAHY. WALTER H. SAUNDERS, Attorneys for Respondents.



#### IN THE

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

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Petitioners,

VS.

E. B. SPILLER et al.,

Respondents.

No. 577.

### MOTION OF RESPONDENTS TO ADVANCE ABOVE CAUSE ON DOCKET

To the Honorable, the Supreme Court of the United States:

E. B. Spiller et al., respondents in the above-entitled cause, respectfully move this Honorable Court to advance said cause on the docket for argument on the following grounds:

## BRIEF STATEMENT OF FACTS.

This case involves the right of certain cattle shippers to receive preferential payment under a reparation judgment,

rendered by this Court, affirming the award of the Commission, in the case of Spiller et al. v. Atchison, Topeka & Santa Fe Railway Company, 253 U. S. 117, against nine carriers, eight of whom, presumably, have paid the judgment of this Court. During the pendency of these proceedings before the Commission for an award of reparation, which originated in an advance by certain carriers of cattle rates, in the year 1903, to the extent of 3 cents a hundred from Southwestern points to various markets, the St. Louis & San Francisco Railroad Company, one of the carriers, went into the hands of Receivers, on May 27, 1913, under consent proceedings (Rec., p. 11). This railroad company, its Receivers and its successor, have, at all times, contested the right of the shippers (respondents herein) to obtain reparation for these excess charges. The history of this litigation is well set out in the opinion of the United States Circuit Court of Appeals in this case (Rec., pp. 699 to 704), and shows that, from 1905 to date, respondents have been diligently endeavoring to recover from these petitioners the excess charges, paid by them, and condemned by the Commission in its reparation orders and by this Court in its judgment, supra.

This Court, in the Spiller case, supra, 253 U. S. 117, l. c. 120-121, and l. c. 124-125 and 126, 127-128 and 129, also gave the history of this litigation and points out that the respondents in this case have been litigating this matter, beginning in February, 1904, with a petition filed before the Interstate Commerce Commission under Section 13 of

the Commerce Act, challenging the advanced rates as unjust and unreasonable under the Commerce Act and seeking relief to the extent of said advance of 3 cents a hundred pounds.

The grounds of this motion are:

First. That under rule 18 of this court, paragraph 5: "Cases once adjudicated by this court upon their merits and again brought up may be advanced by leave of the Court."

Second. The matters, involved herein, arose under the Commerce Act of the United States and under the theory of the Expedition Act, cases so arising, should be advanced.

Third. This matter has been continuously in litigation since February, 1904, before the Interstate Commerce Commission, the Federal District Courts, the United States Circuit Court of Appeals of the Eighth Circuit and this Court; and these considerations constitute the special cause for advancement under said rule 18, paragraph 7.

Wherefore, respondents pray that said cause may be advanced on the docket for argument.

S. H. COWAN,
DAVID A. MURPHY,
JOHN S. LEAHY,
WALTER H. SAUNDERS,
Attorneys for Respondents.



## FILE COPY

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WM. R. STANSBURY

No. 577.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

ST. LOUIS AND SAN FRANCISCO RAILROAD COM-PANY AND ST. LOUIS-SAN FRANCISCO RAIL-WAY COMPANY, PETITIONERS,

VS.

E. B. SPILLER ET AL, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

### BRIEF FOR RESPONDENTS.

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David A. Mubphy,

John S. Leahy,

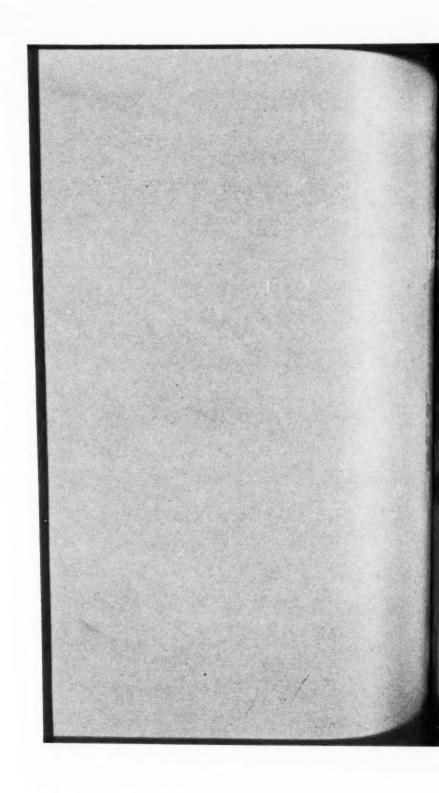
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pany, where the stockholders of the original debtor	

company had been given an interest in the reorganized railway company-in the instant case over \$45,-000,000 in stock without the payment of anything therefor. This is particularly true where, as in the instant case, the purpose of the receivership was to preserve the railroad property as a unit, and it was sold as such and bought in as such by stockholders and bondholders of the original railroad company in order to preserve the continuity of ownership 57 V. Intervenors are entitled to recover said excess charges upon the theory of the rule, underlying the right of preferential payment of claims for labor. 60 VI. A court of equity, as a matter of public policy, will order said excess charges repaid to the intervenors. the shippers and representatives of shippers of live stock. . . 67 VII. Neither the reorganization nor the trust fund theory is inconsistent with or abrogated by the remedy for the collection of overcharges, prescribed by Section 16 of the Act 69 The claims of intervenors for said excess charges VIII. should be paid with interest from the date of their 75 Since the entire case is before the court upon the writ of certiorari, the court will decide the case. Intervenors are entitled to recover attorneys' fees taxed as costs in the litigation in the District Court of the United States of the Western Division of the Western District of Missouri, because, pursuant to the order of the court, the receivers of the railroad company contested the claims of these intervenors in all the Federal District Courts and, thereafter,

by the reorganized railway company for eleven years. In this way the costs were created, including attorneys' fees, which, under Section 16 of the Act,

can be recovered as an incident to the enforcement of an order of reparation by judicial process.  In equity there is no wrong without a remedy. "Equity will do complete justice." "Equity delights to do justice and that not by halves." "Equity regards substance rather than form." "Equity imputes an intention to fulfill an obligation."	76
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XI. The decision of the Circuit Court of Appeals that intervenors' claims "arose" after the entry of the final decree, and that they were not precluded by the final decree and the order of confirmation of sale from asserting said claims, is correct on this point. Opinion of the United States Circuit Court of Appeals (R. pp. 755-760) 14 Fed. 2d, l. c. 291-293, where the court reviews the contention of petitioners on this point at length, states the applicable facts, holds that the purchaser of the property, the railway company, expressly agreed, under the order of court, to pay the claims of intervenors if established, and cites many applicable authorities as to the meaning of the term "arise."	79
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

ST. LOUIS AND SAN FRANCISCO RAILROAD COM-PANY AND ST. LOUIS-SAN FRANCISCO RAIL-WAY COMPANY, PETITIONERS,

VS.

E. B. SPILLER ET AL, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

#### STATEMENT.

The trial court sustained exceptions to those parts of the Master's report which were inconsistent with the views cxpressed in his memorandum opinion. The facts stated by the trial court in his memorandum opinion are in harmony with the facts found by the Master. All of the findings of fact by the Master are consistent with the memorandum opinion. The trial court disagreed with the Master only in his conclusions of law. Therefore, no exceptions were sustained to the findings of fact of the Master and those findings of fact constitute the facts in the case in this court. The Circuit

Court of Appeals adopted the findings of fact of the Master and state: "The findings of the Master and the statement by the trial court have little in dispute as to the controlling facts." The statement of facts in the brief for petitioners (R. pp. 1-3 & 7-20) omits facts essential to a fair determination of the case, which are:

- (1) In the original creditor's bill, filed in this case, on May 27, 1913, by the North American Company, a general creditor, it was averred (R. pp. 6-7) that it was necessary to maintain the railroad property as a unit and the prayer of the bill (R. p. 9) was to that effect. On the same day, (R. p. 11) the railroad company appeared by its counsel and by motion consented to the order appointing receivers for it, who under said order took possession of all of the property of said railroad company for the benefit of its creditors, as their interests might appear, and so operated said road.
- (2) On April 3, 1914, a like bill was filed by another creditor, containing similar averments as to the necessity for maintaining the railroad property as a unit and a similar prayer, which bill was consolidated with the above.
- (3) On May 22nd, 1914, the trustees under the general lien mortgage of the railroad company, dated August 27, 1907, filed a bill for foreclosure with like averments as to the necessity for maintaining the railroad property as a unit and a like prayer.
- (4) On July 9, 1914, the trustees of the railroad company's refunding mortgage, dated June 20, 1901, filed a bill for foreclosure, with like averments as to maintaining the railroad property as a unit and a like prayer.
- (5) The four above suits, in all of which the same receivers had been appointed, were consolidated into a single suit, entitled "North American Company, Complainant, v. St. Louis and San Francisco Railroad Company, Defendant, No.

4174, Consolidated Cause Final," and the final decree of foreclosure and sale was rendered in this consolidated cause and in each of its constituent causes (R. p. 591).

- (6) Until the receivers were appointed, under the bills filed on May 22, 1914 and July 9, 1914, by the trustees respectively under the general lien mortgage and under the refunding mortgage, the income of the road was not impounded for the benefit of the respective bondholders. By interlocutory decree, the income was impounded May 29, 1914.
- (7) The bi-monthly reports of the Special Master, appointed in the original cause and subsequently in the consolidated cause, are found (R. pp. 559-579) and cover the period from May 28, 1913, (the day after the appointment of the receivers under the original bill) to April 30, 1914.

An analysis of the first bi-monthly report (R. pp. 565-6) will show that the receivers collected on accounts "accrued prior to the appointment of receivers and collected under receivership," the sum of \$2,245,153.79 from May 28, 1913 to June 30, 1913 beginning with the cash balance, on May 27, 1913, of \$603,849.96, and during the same period collected from accounts "accrued and collected under receivership" the sum of \$3,324,632.06, or a total from both sources of \$5,569,785.85; whereas the disbursements (R. p. 519) show disbursements made on account of debts accrued, prior to the appointment of receivers, to the extent of \$3,985,121.02, and disbursements for debts accrued under the receivership, \$950,821.11, or a total disbursement of \$4,935,942.13, leaving a cash balance on June 30, 1913, of \$633,843.72.

It will be observed under the above table (R. pp. 565-6) that, during the period from May 28, 1913 to June 30, 1913, from the sums of money collected from accounts, both prior and subsequent to the receivership \$3,985,121.02 was disbursed to pay debts accrued prior to the receivership, but

an analysis of this disbursement will show that \$3,976.03 was paid out for material and supplies. Taxes, \$584,526.58. Interest coupons \$1,419,427.43. Interest rental \$93,548.39, or a total of \$2,101,478.43, all paid on debts accrued prior to appointment of receivers and every cent of which enured to the benefit of the bondholders of the road. Deducting this amount from the \$2,245,153.79 collected from accounts, accruing prior to the receivership, the balance is \$143,675.36.

An analysis of the five succeeding bi-monthly reports will show large cash balances ranging from \$1,964,309.60, on August 31, 1913 (R. p. 569), to \$990,612.74 on April 30, 1914 (R. p. 579) with the smallest cash balance \$681,163.58, on October 31, 1913 (R. p. 571). An analysis of these bi-monthly reports will show millions of dollars diverted from income for the benefit of the bondholders, prior to their impounding said income under said two bills above referred to. As well stated in the case of Love v. North American Company, (C. C. A. 8th Circuit, December 4, 1915) 229 Fed. 103, l. c. 106:

"When the receivers (of the Frisco Railroad Co.) were appointed, they received from the Frisco Co. as shown by their first bi-monthly report over \$600,000.00 in cash. It also appears that, eliminating all items except current receipts and current expenses, the earnings and operating expenses of the Frisco Company, from May 27, 1913 to April 30, 1914 (all prior to any action by the bondholders), were as follows:

Earnings \$48,380,219.06 Operating expenses 35,449,360.17

Leaving a balance over operating expenses of

\$12,930,858.89"

The court then asked (l. c. 106) to whom the excessive freight charges, paid by Love, belonged, and, after dis-

cussing the matter and pointing out the identity of the money, so collected, as having passed into the treasury of the company and into the hands of the receiver, added:

"That money came into the hands of a court of equity. What ought such a court to have done with it? Surely it could do nothing but direct that it be returned to the shippers to whom it belonged. It having been paid to the bondholders, or for permanent betterment of the property for their benefit through the agency of a court of equity, that court, as a court of conscience, can do no less than direct its restoration" (italics ours).

(8) The very purpose of the reorganization scheme under this receivership was to perpetuate the ownership of the railroad company by its original stockholders and bondholders, which is shown by the plan of reorganization, set out in full in the record, prepared by the reorganization managers, J. & W. Seligman & Company and Speyer & Company, bankers, dated November 1, 1915 (R. pp. 341-433).

The "Reorganization Agreement" included in the reorganization plan (R. p. 402) recited an agreement, dated November 1, 1915, "between J. & W. Seligman & Co., and Speyer & Co., respectively co-partnerships, hereinafter called the reorganization managers, parties of the first part, and holders of the bonds, trust certificates and stock hereinafter mentioned, who shall become parties to this agreement as hereinafter provided, their successors and assigns, and the holders of certificates of deposit issued under or subject to the plan, hereinafter collectively called depositors, parties of the second part," and this agreement (R. p. 403), set out what bonds, trust certificates and stock might be deposited under said plan.

This plan of reorganization was submitted to the Public Service Commission of the State of Missouri (R. pp. 467-481) and the opinion of the Commission is set out in the record (R. pp. 482-536) and supplemental report of the Commission (R. pp. 536-548). The Public Service Commission of Missouri made another report in this matter (R. pp. 548-554).

This plan and these opinions show a typical case of railroad reorganization for the benefit of its original stockholders and bondholders, and the statement of Judge Hook, administrative judge in the Missouri-Pacific Railroad receivership, in case of Guaranty Trust Co. v. Mo. Pac. Ry. Co., 238 Fed. 815, as to the real character of these reorganizations effected through federal receivership, is very pertinent.

(9) Under the final decree of foreclosure in the consolidated suit all the property of the Railroad Company was sold in four separate parcels, as appears from said Record (R. pp. 615-16 Final Decree) and from an indenture, dated September ..., 1916, between Thos. T. Fauntlerov. Special Master, appointed to make the said sale, the St. Louis & San Francisco Railroad Company, party of the second part, its three receivers, parties of the third part, and the trustees under the general lien mortgage of the Railroad Company dated August 27, 1907, parties of the fourth part (R. pp. 700, 703, 705). The first two sales were under collateral trust agreements, covering a large amount of securities, and each sale was made for the sum of \$10.00. The third sale was under a collateral note and was made for the sum of \$600,000.00, and the fourth sale was of all the remaining property of every character and description of the Railroad Company as an entirety, for the sum of \$45,700,200.00, which consideration was paid by turning over to the Special Master, to be cancelled or credited, as provided by said final decree, bonds and coupons to be paid out of the proceeds of sale on distribution thereof, as set forth in said final decree, or the Special Master was authorized to accept a receipt for a sufficient amount of said bonds to cover said consideration, and said bonds were delivered accordingly as per said receipt (R. pp. 682-3 Order Confirming Sale).

Under these sales the continuity of ownership, carefully worked out in the plan of reorganization, was preserved and the stockholders of the old company, as found by the Special Master in his report in this case (R. p. 160), received \$45,650,000 of the stock of the new company under the reorganization plan, as representing their equity in the properties without the payment of anything by them therefor, which finding is adopted in the opinion

## ADDITION TO PARAGRAPH (9)

No offer of any kind was made to those intervenors nor was their claim listed by the receivers as requied by the final decree.

It is conceded in the record that interveners and no actual notice or knowledge of the interlecutry decrees, or of the final decree, until August 3, 1916." (Opinion of G.C.A., R.p. 752, 14 Fed. [2nd) 1.c. 290)

reorganized Railway Company, largely in excess or the claims of intervenors."

The Special Master's Report (Rec. p. 163) shows that there was not a year, from June 30, 1906, to May 27, 1913, the date of the consent receivership, except the year end-

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(10) "It is established by the record here that, at all times after the excessive freight charges were collected and down to the receivership, the Railroad Company had in its treasury money in excess of the claimed overcharges, and that it turned over to the receiver some \$300,000.00" (Opinion of the U. S. Cir. Ct. of Apps., R. p. 747).

The court found as a fact (Rec. p. 747) that in addition to this \$300,000.00 "a large amount of cash (shown by the record to be over \$5,000,000.00 (Special Master's Report, p. 165)) was also turned over by the receivers to the reorganized Railway Company, largely in excess of the claims of intervenors."

The Special Master's Report (Rec. p. 163) shows that there was not a year, from June 30, 1906, to May 27, 1913, the date of the consent receivership, except the year ending June 30, 1908, when the operating income exceeded operating expenses, including taxes, by \$9,944,600.89, that the operating income of the Frisco Company did not exceed its operating expenses, including taxes, by over \$11,000,000.00 (R. p. 163).

The Special Master also finds (Rec. p. 163) that the operating income of the Frisco Railroad Company from June, 1906, to May 27, 1913 (the date of the consent receivership), was over \$92,000,000.00; that, during the receivership, the operating revenues largely exceeded the operating expenses, including taxes. "The receivers turned over to the Railroad Company (the new company) over \$5,000,000.00, after paying out large sums of money from operating income as interest on bonded indebtedness and for betterments to the road and to the equipment, and for the purchase of new equipment" (Rec. p. 186).

(11) On February 21, 1921, Judge Sanborn sitting in the United States District Court after full argument (the attorneys for the Frisco Railway Company, opposing leave to intervene) entered an order (R. p. 13) allowing E. B. Spiller, et al., to intervene in said consolidated cause and rendered the following memorandum opinion: On February 12, 1921 (Rec. pp. 13-14) upon which said order, granting leave was based:

"Sanborn, Circuit Judge:

In view of the opinion in Love v. North American Company, 229 Fed. 123, and of the averments of the applicants, that on account of the necessity of first establishing their claims by the findings and orders of the Interstate Commerce Commission they could not have enforced them in the foreclosure proceedings at any time before February 1, 1916, the limit of the time fixed for presenting claims by the orders in those proceedings, that they have been diligently establishing these claims by necessary litigation before the Interstate Commerce

Commission, the District Court and the Supreme Court, and that they notified the attorneys for the purchasers at the foreclosure sale before they paid for their purchase of their claims and their intention to press them, the court is not persuaded that they are barred in this court of equity from a presentation and consideration of their claims either by the orders limiting the time within which claims were to be presented in the foreclosure proceedings or by the inexcusable laches of the applicants."

Subsequently, on March 10, 1921, Judge Sanborn, after hearing arguments (the attorneys of the Frisco Railway Company opposing leave to intervene) permitted supplemental intervening petitions to be filed by E. B. Spiller and E. B. Spiller, et al. (R. pp. 91, 93-94).

When said interventions were tried before the Special Master, a stipulation as to certain facts was made and filed as evidence in the case, (Rec. pp. 329-333). Paragraph 1 of the stipulation relates to the four separate bills filed, under all of which receivers were appointed, the consolidation thereof and the entry of the interlocutory decree on May 29, 1914 "impounding the property of defendant for the payment of its debts and obligations."

Paragraph 2 (Rec. pp. 329-332) is as follows:

"That the gross receipts of defendant during each year from June 1st, 1906, to May 27th, 1913, exceeded defendant's operating expenses during each such year in an amount in excess of interveners' claims, including interest thereon; that during each of said years within said period defendant expended large sums of money in making improvements to its lines of railroad and equipment and in paying interest on its bonded indebtedness, and during each of said years during said period expended large sums of money in current expenses incurred in the ordinary operation of its lines of railroad; that during each of said years within said period defendant at all times had in cash on hand an amount of money in excess of said claims of interveners with interest there-

on; that during the period of the receivership of the property of defendant, to-wit: May 27th, 1913, to January 29th, 1918, the gross operating receipts of said receivership during each of said years within said period were in excess of the operating expenses of said receivership, such excess amounting during each of said years to more than the total of the claims of interveners herein with interest; that during the period of said receivership, said receivers paid out under orders of said court large sums of money for improvements and betterments to the property and equipment of defendant, and large sums of money to bondholders of defendant by way of interest on its bonded indebtedness; and during each year within said period said receivers paid large sums of money incurred as current expenses for the operation of the lines of railroad of defendant during said receivership; that the alleged overcharges constituting interveners' demands were not kept by defendant in a separate or designated account or fund, nor where they separated from other gross receipts of defendant derived from the operation of its lines of railroad; that said moneys so collected by defendant were deposited in banks with other moneys of defendant in defendant's general account and said banks had no instructions from defendant to keep said moneys in a specific fund nor to refrain from paying same out in the ordinary course of business on defendant's checks against its funds in said banks, nor did said banks keep said moneys in a separate account, and that defendant checked out of its deposits in each of said banks during each year from June 1st, 1906, to May 27th, 1913, sums of money largely in excess of said alleged overcharges, and deposited in said banks during each of said years sums of money largely in excess of said alleged overcharges; that upon the appointment of said receivers, defendant turned over to said receivers and said receivers received from defendant in cash, the sum of approximately three hundred thirty-four thousand dollars (\$334,000.). The term 'large sums of money' as used in this paragraph II means at least several hundred thousand dollars."

The Special Master in his report (Rec. p. 153) finds that the Interstate Commerce Commission stated, on

August 16, 1905, its conclusion in its opinion in the case of Cattle Raisers Association of Texas v. M. K. & T. Co. et al., 11 I. C. C. Rep. 296, l. c. 352, as follows:

"It has been found that the advances made during the year 1903, as shown by the appendix were unjust and unreasonable, and that the present rates are unjust and unreasonable by the amount of said advances. The defendants should, therefore, be required to cease and desist from the maintenance of these rates. \* \* All questions of reparation are reserved."

and reaffirmed this ruling, April 14, 1908, 13 I. C. C. 418.

This finding of the Master was adopted in the opinion of the United States Circuit Court of Appeals (R. p. 744) 14 Fed. (2d) 284, l. c. 285-6.

### POINTS AND AUTHORITIES.

T.

The collection of said excess charges by the carriers from the intervenors in this case was under duress, or compulsion, the shippers being either required to pay such illegal exactions, or abandon their business.

R. R. Co. v. Lockwood, 17 Wall. 379. So. Pac. Co. v. Adjustment Co., 237 Fed. l. c. 962. Love v. North American Co., 229 Fed. l. c. 106. Spiller v. St. Louis & San Francisco R. R. Co. et al., Opinion of U. S. Cir. Court of Appeals (R. pp. 762-63) 14 Fed. (2d) 284, l. c. 294.

#### TT.

(1) Section VI of the Commerce Act requires all railroads to publish their rates so as to secure uniformity and prevent discrimination among shippers, and as long as the published rate stands, the carrier must charge it and the shipper must pay it; but the mere publication of the rate does not determine its lawfulness under Section I of the act prohibiting unjust and unreasonable charges. If the published rates cannot be assailed because "lawful," then a Frankenstein has been created to destroy the act.

> Arkansas Fuel Co. v. C. M. & St. P. Ry. Co., 16 I. C. C. Reports 95, l. c. 96, 97, 98; (decided Apr. 5, 1909).

Following the two earlier cases of

Poor Grain Co. v. Chicago, Burlington & Quincy R. R. Co., 12 I. C. C. Rep., 418, l. c. 421-423, 425 (decided July 8, 1907), and

Coomes v. Chicago, Milwaukee & St. P. Ry. Co., 13 I. C. C. 192, l. c. 194 (decided March 10,

1908), where the Commission say:

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is to effect of published tariffs, or form of bill of lading filed therewith and incorporating an illegal provision, vid. Boston & Main R.R. Company v. Fiper, 246 U.S., 489, l.e. 445, 65 L.ed., 850, l.e. 885 - bolding such filing, or publication, do so not validate as illegal condition contained therein.

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"Poor indeed would be the plight of shippers who have been compelled to pay excessive rates under such interpretation of the law."

(namely, that the *legal published* rate is always the *lawful* rate) which altereth not, and both of which cases distinguish between the legal, or published rate, and the lawful rate valid under Section I of the act. The commission in the Arkansas Fuel case applied the reparation rule, settled conclusively in

T. & P. R. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, l. c. 442.

Crescent Coal & Mining Co. v. Chicago & Eastern Illinois R. R. Co., XXIV I. C. C. p. 149, l. c. 156-158; (decided June 8, 1912),

where the Commission again explodes the fallacy that because the published rate is *legal* under Section 6, and must, therefore, be collected by the carrier and paid by the shipper, it must be *lawful* under Section I. This early construction of the Act has never been questioned either by the Commission or this court. Judge Sanborn's opinion in this case is the only dissenting note. Also in the following:

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Southern Pacific Co. v. I rnell-Taenzer Lumber Co., et al, 245 U. S. 531.

Mills v. Lehigh Valley R. R. Co., 238 U. S. 473.

Phillips v. Grand Trunk Ry. Co., 236 U. S. 662.

Darnell-Taenzer Co. v. Southern Pacific Co., 221 Fed. l. c. 894.

L. & N. R. R. Co. v. Schools Sheffield Steel & Iron Co., 269 U. S. 222, 70 L. Ed. 245.

Baer Bros. Merc. Co. v. D. & R. G. R. R. Co., 233 U. S. 479, l. c. 481-486.

Sections I, VI, IX and XXII, Act to Regulate Commerce.

(2) Receivers of carriers are specifically made liable to the provisions of the Interstate Commerce Act. Section 10, Section 19a, Paragraph (k), Section 20, Paragraph (5).

#### Ш.

The railroad company unlawfully exacted from these intervenors and their assignors the excess charges, which formed the basis of this action, and became a trustee in invitum, or ex maleficio, for their benefit. These trust funds passed into the hands of the receiver, and therefore should be returned to these intervenors by a court of equity.

Spiller v. St. Louis & San Francisco R. R. Co., et al, Opinion of U. S. Cir. Court of Appeals (R. pp. 760-764) 14 Fed. (2d) 284, l. c. 293, 295.

3rd Pom. Eq. Jur., Sec. 1055.

Love v. North American Co., 229 Fed., l. c. 106.

White v. Delano, 270 Mo. 216.

Mercantile Trust Co. v. St. Louis & San Francisco Ry. Co., 69 Fed. 193.

Angle v. Chicago, St. P. M. & O. R. Co., 151 U. S. 1. Chapman v. Douglass, 107 U. S. 348.

Central Stock & Grain Exchange of Chicago v. Bendinger, 109 Fed. 926.

Richardson v. N. O. Debenture Redemption Co., 102 Fed., l. c. 782.

Arkansas Fuel Co. v. C. M. & St. P. Ry. Co., 16 I. C. C. Reports 97.

Southern Pacific Co. v. Darnell-Taenzer Lumber Co. et al. 245 U. S. 531.

Mills v. Lehigh Valley R. R. Co., 238 U. S. 473. Phillips v. Grand Trunk Ry. Co., 236 U. S. 662.

Darnell-Taenzer Co. v. Southern Pacific Co., 221 Fed., l. c. 894.

Sections I, VI, IX and XXII, Acts to Regulate Commerce.

39 Cyc. 591.

U. S. Bank v. Bank of Washington, 6 Pet. 17; 8 L. Ed. 299.

Olrichs v. Williams, 15 Wall., 221 L. Ed., l. c. 224. Broom on Legal Maxims, 8th Ed., p. 191.

Pom. Eq. Jur., Vol. 1, Sec. 423.

Toledo A. A. & N. N. Ry. Co. v. Penn. Co. et al., 54 Fed. 746, l. c. 751-752.

Southern California Railway Co. v. Rutherford, et al, 62 Fed., l. c. 797-798.

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IV.

Remone City Terminal My.Co. v. Central Union Trust Co., 271 U.S.,p.445, 1.c. 32-454, 70 L.ed., 1028, 1.c. 1081-2-3;

Pierce v. United States, 250 V.S., 296, 1.c. 402-5, 404-6, 65 L.ed. 697, 1.c. 702-704, especially where corporate debtor has knowledge of pending claim and stockholders of reorganized company, asymiring assets of old company, are volunteers, 1.c. 405.

Vesteh et al v. american loan à Trust Co et al, 84 Poi., 274, (Girenit Court of Appeals, Eighth Circuit. Recember 6, 1897 - Opinion by Brewer, Circuit Justice, concurred in by Sanborn and Bayer, Circuit Judges) l.c. 277.



Harrigan v. Gilchrist, 99 N. W. 909.

Sweet v. Montpelier Savings Bank & Trust Co., 69 Kan. 641.

Matthews v. Forslund, 112 Mich. 591.

Barksdale et al v. Finney et al, 14 Grattan 338.

Williams v. Young, 81 Atl. 1118.

Traders Bank v. Fraser, 162 Mich. 315, l. c. 318. Converse v. Sickles, 44 N. Y. Sup. 1080, affirmed in 161 N. Y. 666.

Sugar Refining Co. v. Fancher, 145 N. Y. 552, l. c. 561.

20 Corpus Juris, p. 21.

Dayton-Goose Creek Railway Co. v. The United States, 263 U. S. 455.

Section 15-A of the Act to Regulate Commerce. Commonwealth ex rel v. Scott, 112 Ky. 252.

#### IV.

Intervenors without reference to their other equities, are entitled to recover these excess charges from the new company, the St. Louis, San Francisco Railway Co., under the rule announced in Northern Pacific Ry. Co. v. Boyd, 228 U. S. 481 and other cases to the same effect under Point I, supra, relating to the right of a creditor to recover against a reorganized company, where the stockholders of the original debtor company had been given an interest in the reorganized railway company—in the instant case over \$45,000,000 in stock without the payment of anything therefor. This is particularly true where, as in the instant case, the purpose of the receivership was to preserve the railroad property as a unit, and it was sold as such and bought in as such by stockholders and bondholders of the original railroad company in order to preserve the continuity of ownership.

Central of Georgia Railway Co. v. Paul, 93 Fed. Rep. 878.

Northern Pacific Ry. Co. v. Boyd, 229 U. S. 481. Northern Pacific Ry. Co. v. Boyd, 177 Fed. 804. Guardian Trust Co. v. Cambria Steel Co. et al., 210 Fed. 696.

Affirmed 240 U.S., page 166.

Walden v. Bodley, 14 Pet. 164, 10 L. Ed. 398.

Guaranty Trust Co. v. Missouri Pacific Ry. Co. 238

Fed. 812, l. c. 814-16. McDonald v. Nebraska, 101 Fed. 171, l. c. 177-182. Chicago Ry. Co. v. Howard, 7 Wall. 392, 409, 74 U. S. 392, 409, 19 L. Ed. 117.

Louisville Trust Co. v. L. N. A. & C. Ry. Co., 174 U. S. 674.

### V.

Intervenors are entitled to recover said excess charges upon the theory of the rule, underlying the right of preferential payment of claims for labor, supplies etc.

Love v. North American Co., 229 Fed. 103, l. c. 107. North American v. Lamont, 69 Fed. 496. Southern Railway Company v. Carnegie, 76 Fed. 496.

Blair v. Railway Co., 22 Fed. 471. Atkins v. Railroad Co., 3 Hughes 307.

Hale v. Frost, 99 U. S. 389.

Burham v. Bowen, 111 U. S. 776.

Union Trust Co. v. Morrison, 125 U. S. 591.

N. Y. Guaranty Trust Co. v. Railway Co., 83 Fed. 365-370.

## VI.

A court of equity, as a matter of public policy, will order said excess charges repaid to the intervenors, the shippers and representatives of shippers of live stock.

Blake v. Railroad, 19 Minn. 418. Morgan v. Louisiana, 93 U. S. 217.

Southern California Railway Co. v. Rutherford, 62 Fed. 797.

Mercantile Trust Co. v. St. Louis & San Francisco R. R. Co., 193.

Love v. North American Co., 229 Fed. l. c. 107. R. R. Co. v. Lockwood, 17 Wall. 279.

V.

Southern Railway Co. v. Carnegie Steel Company, 176 U.S., 257, 44 L.M., 458, 1.c. 275-279, 1.c. 466-468. "Affirmed the opinion of the U.S. Circuit Court of Appeals for the 4th Circuit, 4 Pol., 452, supra."

Circuit Court of Appeals, Eighth Circuit, December 6,1897 pinion by Brower, Circuit Justice, consurred in by Sanborn of Theyer, Circuit Judges) 1.00 277.

ramere Lean & Trust Co. V. American Water Works Co., 107 ed., page 25 (Circuit Court, D.Hebrasha. March 30, 1895 pinion by Samborn, Circuit Judge) 1.c. 30-51.

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So. Pac. Co. v. Adjustment Co., 237 Fed. l. c. 962. State ex rel Barker v. R. R. Co., 216 Fed. 564. U. S. & Mexican Trust Co. v. Kansas City M. & O. Ry. Co., et al, 240 Fed. 505. White v. Delano, 270 Mo. l. c. 38. And cases cited, supra, under Points III and V.

#### VII.

Neither the reorganization nor the trust fund theory is inconsistent with or abrogated by the remedy for the collection of overcharges, prescribed by Section 16 of the Act.

Spiller v. St. Louis & San Francisco R. R. Co., Opinion of the U. S. Cir. Court of Appeals (R. pp. 764, 767) 14 Fed. 2d, 284 l. c. 295, 296.

Citing and applying T. & P. R. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426 l. c. 466, discussing Section 22 of the then act and the present act, providing:

"And nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

The court added, l. c. 295, that since the intervenors followed the only remedy provided by the act, to reduce the reparation order to judgment against the recalcitrant carrier, there could be no election, citing

20 C. J., 21,

and adding (l. c. 295-6):

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"Further, as said in 39 Cyc. p. 591: 'As a general rule the jurisdiction of equity in establishing and enforcing trusts is in addition to and concurrent with any remedies at law the party may have.' See, also, 6 L. R. A. (N. S.) 793; Fitzgerrell v. Federal Trust Co., (Mo. App.) 187 S. W. 600; Krippendorf v. Hyde & Another, 110 U. S. 276, 4 S. Ct. 27, 28 L. Ed. 145."

See, also cases cited, infra, under Point IX.

#### VIII.

The claims of intervenors for said excess charges should be paid with interest from the date of their illegal collection.

Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co., 269 U. S. 217, l. c. 238, 239, 240,

where the court holds:

"It has been the uniform practice of the Commission to recognize as an element of the damages, loss of interest on charges unlawfully exacted; and, in ordering reparation, it has usually included as a part of the damages such interest from the date of the payment."

Citing many cases of this court and of the Commission in the decision and in Notes 10 and 11 supporting this conclusion. This case conclusively settles the question of interest.

#### IX.

Since the entire case is before the court upon the writ of certiorari, the court will decide the entire case. Intervenors are entitled to recover attorneys' fees taxed as costs in the litigation in the District Court of the United States of the Western Division of the Western District of Missouri, because, pursuant to the order of the court, the receivers of the railroad company contested the claims of these intervenors in all the Federal District Courts and, thereafter, by the reorganized railway company for eleven years. In this way the costs were created, including attorneys' fees, which, under Section 16 of the Act, can be recovered as an incident to the enforcement of an order of reparation by judicial process.

In equity there is no wrong without a remedy. "Equity will do complete justice." "Equity delights to do justice and that not by halves." "Equity regards substance rather

# VIII.

to allowing interest, Bissouri Pas. Rd. Co. V. Ault, 256 U.S., 864, 1.c. 559, 561, 563, "Such damages may beasenably include interest and costs", 1.c. 564.

mreveport Grecosting Go. V. Louisians & Pac. Sy. Go., Director queral, as Agent, et al. opinion by full Commission, 92 I.C.C., 319, 1.c. 584-527, citing and following Ault case, supra.

Green-Sillianette Paper Co. v. Director General, as agent, 100 I.C.C. 597, 1.c. 402, eiting and following the Shreveport Greensting Company case, supra-

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than form." "Equity imputes an intention to fulfill an obligation."

Harrigan v. Gilchrist, 99 N. W. 909.

Mercantile Trust Co. v. St. Louis & San Francisco Ry. Co., Ogden et al., Intervenors, 69 Fed. 193. Sweet v. The Montpelier Savings Bank & Trust Co.,

69 Kan. 641 (77 Pac. 538).

Matthews v. Forslund, 112 Mich. 591. Barksdale et al., v. Finney, et al., 14 Grattan, 338.

#### X.

The intervenors are neither precluded by alleged laches from a recovery of the excess charges (held by the Commission to be 3¢ per cwt. in excess of a just and reasonable rate) and condemned by Section I of the Commerce Act as unjust and unreasonable and condemned by the common law, nor by any alleged bar arising out of the interlocutory decree or the final decree.

First Opinion of Judge Sanborn, (R. p. 61). Report of Special Master (R. pp. 152-166; 168-173). Opinion of the U. S. Cir. Court of Appeals (R. pp.

749-754).

Mathieson v. Craven, 247 Fed. l. c. 226.

Ide v. Trorlicht, Duncker & Renard Carpet Co., 115 Fed. l. c. 148.

Texas & Pacific R. R. Co. v. Abilene Cotton Oil Co., 204 U. D. 426.

Southern Pacific Co. v. Goldfield Consolidated Milling & Transportation Co., 220 Fed. l. c. 18.

Northern Pacific Railway Co. v. Boyd, 228 U. S. 481. Northern Pacific Railway Co. v. Boyd, 177 Fed. 804. 5 Pomeroy's Eq. Jur., Sec. 35.

Central Improvement Co. v. Cambria Steel Co., 210 Fed. 696.

Central Improvement Co. v. Cambria Steel Co., 201 Fed. 811.

Kansas City Southern Ry. Co. v. Guardian Trust Co., 240 U. S. 164.

Swift & Co. v. Black Panther Oil & Gas Co., 224 Fed. 20.

French v. Capen, 105 U. S. 509.

Rice et al. v. Durham Water Co., 91 Fed. 434.

Southern Pacific Co. v. Bogert, 250 U. S. 482, l. c. 488-89-90; 61 L. Ed. 1107.

Coal Co. v. Doran, 142 U. S. 417.

Kansas City Southern R. R. Co. v. May, 2 Fed. 2nd Series, 680.

Ins. Co. v. M. Girr, 263 Fed. 847, l. c. 855.

Levee District v. Pipe Line, 292 Fed. 474, l. c. 480.

Williams v. Young, 81 Atlantic 1118.

Trader's Bank v. Fraser, 162 Mich. 315, l. c. 318.

Converse v. Sickles, 44 N. Y. Supp. 1080 (affirmed in 161 N. Y. 666).

Sugar Refining Company v. Fancher, 145 N. Y. 552.

#### XI.

l. c. 561.

The decision of the Circuit Court of Appeals that intervenors' claims "arose" after the entry of the final decree, and that they were not precluded by the final decree and the order of confirmation of sale from asserting said claims, is correct on this point. Opinion of the United States Circuit Court of Appeals (R. pp. 755-760) 14 Fed. 2d, l. c. 291-293, where the court reviews the contention of petitioners on this point at length, states the applicable facts, holds that the purchaser of the property, the railway company, expressly agreed, under the order of court, to pay the claims of intervenors if established, and cites many applicable authorities as to the meaning of the term "arise."

#### ARGUMENT.

I, II, III.

The rates collected by the railroad company from these intervenors to the extent that they were unreasonable and unjust were unlawful and the exactions made by the railroad company from these intervenors over and above just and reasonable rates were unlawful exactions.

The Circuit Court of Appeals did not, as stated by petitioners' counsel, on page 22 of their brief, decide that the collection of legally-established rates becomes unlawful because such rates are subsequently found by the Commission to be unjust and unreasonable. The Circuit Court of Appeals decided that "The charging of an excessive and unreasonable rate is *ipso facto* unlawful." The correctness of its ruling in this regard is abundantly sustained by the decisions of this court, by reason and by the act to regulate commerce itself.

At common law unjust and unreasonable charges made by the carrier for transporting passengers or property were unlawful.

By Section I of the Acts to Regulate Commerce it is provided:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property, as aforesaid, or in connection therewith, or for receiving, delivering and handling of such property shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Section VI of the Act to Regulate Commerce requires all railroads to publish their rates. As long as a rate is a

published rate a carrier cannot charge or demand or collect or receive a greater or less rate than the published rate. The published rate is the rate which the carrier must charge and the shipper must pay.

It is contended by the petitioners that if a rate is published in accordance with Section VI of the act, no matter how unreasonable or unjust it may be, it is a lawful rate.

They announce the novel theory that the act of a carrier in collecting an unjust and unreasonable rate from a shipper is lawful when committed, but assumes the nature of a tort because of a subsect and finding of the Commission that the rate was unjust and unreasonable. They do not try to explain how an act, entirely lawful when committed, can thereafter, become unlawful and tortuous. It is difficult to understand what they mean when they say that the act assumes the nature of a tort. How can a rightful, lawful act "assume" any other nature than that of a rightful and lawful act. Of course, their whole contention is without merit. The collection of an unreasonable and unjust rate is an unlawful act at the time the collection is made.

Petitioners' counsel quote from the opinion of Judge Sanborn filed in the district court (288 Fed. 612, Brief page 25) and say that the language of that learned judge is peculiarly apt. Let us analyze this excerpt from Judge Sanborn's opinion:

"The prohibition of Section I and that of Section 6 must be read and interpreted together, and the correct construction of them is that the specific prohibition of Section 6 constitutes an exception from the general prohibition of Section I."

How can this be? Section 6 requires all carriers at all times to publish all of their rates. How, therefore, can the prohibition of Section 6 be an exception to the prohibition of

Section 1. How can the universal ever be an exception? The reasoning of Judge Sanborn in that part of the opinion immediately following the portion just quoted is equally fallacious. The carrier is not bound to publish an unjust and unreasonable rate. When it does publish such a rate it publishes it under the admonition of Section 1, which declares its act to be unlawful.

In enacting the Act to Regulate Commerce Congress had at least two principal objects in view, the prohibition of unreasonable and unjust rates and the prevention of discrimination of all kinds. These two objects are accomplished in Sections 1 and 6 of the act and full effect may be given to both of them. This same question has been before the Interstate Commerce Commission many times.

In those cases it was urged by the carriers that since the published rate was the legal rate the carrier in charging it was doing something that it had a lawful right to do, and that, therefore, in collecting that published rate they were not injuring the shipper and, therefore, since the shipper had suffered no wrong, he could not be entitled to reparation.

In passing on the proposition the Interstate Commerce Commission in Arkansas Fuel Co. v. C. M. & St. P. Ry. Co., 16 I. C. C. Reports, p. 97, said, citing its two earlier decisions, Poor Grain Co. v. C. B. & Q. Rd. Co., 12 I. C. C. 418, l. c. 425, and Coomes v. C. M. & St. P. Ry. Co., 13 I. C. C. 192, l. c. 194:

"It has been said that the word 'legal' looks more to the letter and 'lawful' to the spirit of the law; that 'legal' imports rather than the forms of law are observed and the rules prescribed obeyed, and the word 'lawful' that the act is rightful in substance. The two words may aptly be used as illustrative of the distinction that we have attempted to draw in the cases cited. It is provided in Section 6 of the act that no carrier shall collect or receive a greater or less compensation than the

rates specified in the tariff in effect at the time of the movement. Other provisions of law make it a misdemeanor for the carrier to depart from the published rate. In dealing with shippers the carrier is therefore required to conform the freight charges actually collected to the amount fixed in its published tariffs. In that sense the published rate in effect at the time of the movement is, therefore, the legal rate. It is what the letter of the law requires the shipper to pay and the

carrier to collect.

"But the first section of the act, following the rule of the common law, declares that all charges for services rendered by carrier in the transportation of passengers or property shall be reasonable and just. It also declares every unjust and unreasonable charge for such a service to be unlawful. In publishing a rate or schedule of rates the carrier therefore acts under this admission of the statute. 
While it may be, and indeed is, the legal rate—the rate that must be paid by the shipper and collected by the carrier because it is the published rate—the mere publication cannot make a rate lawful that is unreasonable and excessive."

This same question has been decided by this court and by the Circuit Court of Appeals on several occasions.

The case of Southern Pacific Company v. Darnell-Taenzer Co., 245 U. S. 531, was a reparation case. In that case the excessive freight charge had been passed on by the shipper to the consumer and it was contended by the railroad company that the shipper had suffered no loss.

Mr. Justice Holmes said, page 534:

"The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. \* \* The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum" (italies ours). If the exactions had not been unlawful, the claims could not have accrued at the time the exactions were made. The carrier receives the illegal profit when the exaction is made.

In this same case the court said:

"But here the plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of the proximate loss."

In the case of Mills v. Lehigh Valley R. R. Co., 238 U. S. 473, which was a reparation case, the Interstate Commerce Commission had found that the shipper was entitled to the excess charges as reparation. It was contended by the railroad company in that case that this was not a finding that the shipper had been damaged.

Mr. Justice Hughes, on page 481, said:

"What the Commission decided was that the shippers were entitled to reparation, that is, to be made whole, to be compensated for a loss because of an illegal and unreasonable exaction."

In the case of *Phillips* v. *Grand Trunk Ry. Co.*, 236 U. S. 662, a case in which recovery was denied because suit had not been filed within the time fixed by the statute, the court, through Mr. Justice Lamar, said:

"But while every person who had paid the rate could take advantage of the finding that the advance was unreasonable, he was obliged to assert his claim within the time fixed by law. When the overcharge was collected a cause of action at once arose and the shipper at once had the right to file a complaint or to intervene in proceedings instituted by others."

The cause of action at once arose because the exaction was unlawful at the time it was made.

The Circuit Court of Appeals, in the case of Darnell-Taenzer Co. v. Southern Pac. Co., 221 Fed. l. c. 894 said:

"Cases of excessive and unreasonable rates differ from discriminating charges in the fact that in the latter there is nothing unlawful in the charging and receiving of the higher or published rate on which the demand for reparation is based; the unlawfulness is in giving a lower rate to someone else. On the other hand, the charging of an excessive and unreasonable rate is ipso facto unlawful."

In the case of Texas and Pacific Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, the court said:

"Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force" (italics ours).

A wrong cannot be unlawfully suffered if the act which causes the wrong is a lawful act. A carrier cannot be ordered by the Commission to desist from violating the law, if it is not violating the law.

All of these cases hold that the exaction of an unjust and unreasonable rate is an unlawful exaction, and unlawful at the time it is made. It can make no difference that in the interest of uniformity, a shipper, before he can bring his action to recover, must secure a finding of the extent to which the rate is unreasonable and unjust. The basic act itself is unlawful. The prescribed procedural steps cannot affect the situation.

Petitioners in their brief seem to blow hot and cold on this proposition. As we have seen they say that the act was lawful when it was committed; that the exaction of an unjust and unreasonable rate was lawful when it was committed, but assumed the nature of a tort after the Commission found that it was unjust and unreasonable.

In discussing the question of laches, later on in their brief (page 50) they say, that intervenors' claims arose in November, 1908 and prior thereto, that is, when the unjust and unreasonable rates were collected. They are right in their latter contention, and intervenors' causes of action accrued when the exactions were made, because the exactions were ipso facto unlawful. Aside from Section 1 of the Interstate Commerce Act, we have a legislative declaration of the unlawfulness "of an unjust and unreasonable rate."

Paragraph 17 of Section 15-A, which was added to the Interstate Commerce Act February 28, 1920, and which is commonly known as the recapture section of the act provides:

"The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates."

A rate is excessive when it is unreasonable and unjust. When it is unreasonable and unjust it is unlawfully excessive.

Counsel for amicus curiae, Missouri Pacific Ry. Company, say that a railroad company, publishing a rate in good faith should not be penalized simply because it is an unjust and unreasonable one, by having its illegal profit declared to be a trust fund. Of course there is no merit in this contention. Why should a railroad company, regardless of its motives, be allowed to retain its "illegal profits"?

Have the shippers no rights? The bondholders have no right to the "illegal profits" because they did not contract for such security. The stockholders and general creditors have no right to such profits. Why should not a court of equity in a receivership prearranged for the benefit of the bondholders and stockholders, give to the shippers what is their own by the impressing of a trust? It is immaterial what the carriers' motives may be in publishing an unlawfully excessive rate. When it collects such a rate, it collects something that it is not entitled to, and it, as was said by this court in Southern Pacific Company v. Darnell-Taenzer Co., supra, "ought not to be allowed to retain its illegal profit."

In this case it can hardly be said that the Railroad Company was acting in good faith. In August, 1905, the Interstate Commerce Commission, after a full hearing, found that the rates involved in this case were unjust and unreasonable to the extent of three cents a hundred pounds and were, therefore, unlawful. The unlawful exactions involved in this case were collected between August 29, 1906, and November 17, 1908. Therefore, this Railroad Company continued to make these unlawful exactions, not only in the teeth of Section 1 of the Act, but in the teeth of this positive finding of the Interstate Commerce Commission. This does not seem to us to comport with the good faith talked about by counsel. However, the motives of a carrier in publishing a rate are wholly immaterial.

The cases cited by petitioners in support of their contention that the Circuit Court of Appeals erred in its decision in this regard are either not applicable at all or they sustain the circuit court of appeals. As we have already seen the case of Texas and Pacific Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, recognizes the principle that the exaction of an unjust and unreasonable rate under the protection of a

published schedule is an unlawful exaction, and a violation of the law.

The question involved in that case was whether or not a shipper, under Section 22 of the Act, which provides:

"Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedy."

could bring and maintain a suit in court, before first obtaining from the Commission a finding that the rate complained of was unreasonable and unjust and a finding as to the extent to which such rate was unreasonable and unjust.

The court points out that one of the primary objects of the act to regulate commerce was to obtain uniformity and to prevent discrimination of all kinds; that, if such a suit could be maintained, then one shipper in one court could get one result and another shipper in another court another result; that by collusive action between some shippers and the carriers favorite shippers would be really charged one rate and other shippers another rate, and that thereby this primary object of the act would be totally destroyed.

The court held, therefore, that, under Section 22 of the Act, only those common law remedies of the shipper were preserved to him which were not inconsistent with the primary purpose of the act, and that to preserve uniformity and to prevent discrimination all shippers would, before they could bring a suit in court, have to have a finding of the Commission that the rate complained of was unreasonable and unjust and the extent to which it was unreasonable and unjust.

In the case of Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S. 184, the plaintiff sued to recover

the difference between the published rate they paid and the lower rates which other shippers had paid because of rebates allowed to them on coal shipped between the same termini. The court held that in such case, previous action by the Interstate Commerce Commission was not a condition precedent to the maintenance of an action in the courts. There was no question as to whether or not the published rate was a reasonable rate or a just rate. The court said that it was extremely doubtful whether at common law a shipper, who had paid a reasonable rate, had a right of recovery because a lower rate was charged to another shipper, but that the statute had given the shipper such right, and that the measure of his recovery was the pecuniary loss suffered by him. While the court used the language quoted in the brief, that language was directed to the facts involved in that case and does not touch this case top, side or bottom. In that part of the opinion preceding the excerpt quoted in petitioner's brief the court said:

"Under the statute there are many acts of the carrier which are lawful or unlawful, according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service and calls for an exercise of the discretion of the administrative and rate regulating body, for the reasonableness of rates and the permissible discrimination based upon differences in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views that might be taken by different tribunals" (italies ours).

This case really sustains the decision of the Circuit Court of Appeals in the case at bar. If acts of the carrier are lawful or unlawful according as they are reasonable or unreasonable, just or unjust, then when the carrier exacts an unjust and unreasonable charge for transportation, its exaction is unlawful.

The case of Robinson v. Baltimore & Ohio R. R., 222 U. S., 506, involved the question as to whether or not under Section 22 of the Act, a shipper could have recourse to the courts because of an alleged discriminatory rate between coal loaded from wagons and coal loaded from a tipple without a prior determination by the Commission as to whether or not the rate was discriminatory and the extent to which it was discriminatory. The court, applying the rule laid down in the Texas & Pacific Railway case, supra, held that, since a right to appeal to the courts in such a case would bring about the same results as the right to appeal to the courts in advance of a finding by the Commission in cases of unreasonable rates, the plaintiff could not maintain an action in the courts without first obtaining the necessary findings from the Commission.

In the case of Chicago, B. & Q. R. R. Co. v. Merriam Millard Co., 297 Fed. 1, the Interstate Commerce Commission made an order that the rate complained of would be unjust in the future to the extent stated in the order. The Commission did not order the inauguration of a new rate, but expressly stated that it expected that the carriers would put the new rate into effect. The carriers did not do so, and later on the Commission made another order establishing the rate for the future and gave the carriers thirty days to publish it. No application was made by the plaintiff for an order of reparation and no order of reparation was made by the Commission. The court held that without first having obtained an order of reparation the plaintiff could not main-

tain the suit. The statement of the court in that case that "the duly filed and published tariff rate while it was in force was the only lawful rate" was unnecessary to the decision of that case under the views announced by the court, and is obiter, and in our judgment, is in conflict with the decisions of this court and with the Commerce Act itself.

The excessive charges, collected by the railroad company in this case being unlawful, the railroad company, when it obtained the money of the shipper, became a trustee ex maleficio of the excessive charges and held the shipper's money, so collected, as a trustee for the shipper. It is well settled that where one wrongfully obtains the possession of another's property by fraud, duress or by taking advantage of another's weakness, the person thus taking the property holds it in trust for the other as a trustee ex maleficio. In 3 Pom. Equity Jur., Section 1053, the rule is thus stated:

"In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of one who is truly and equitably entitled to the same."

That a railroad company and a shipper are not on an equal footing is too plain for argument. That a shipper who pays to a railroad company a rate in excess of a reasonable rate, is as to such excess, acting under practical duress is equally plain. A railroad company, therefore, which collects from the shipper an unreasonable rate is, as to the excess over a reasonable rate, a trustee ex maleficio for the shipper.

The rule announced in Pomeroy is universally approved. It is adopted in the following decisions:

Angle v. Chicago, St. P. M. & O. R. Co., 151 U. S. 125, 38 Law Ed. 55.

Chapman v. Douglas, 107 U. S. 348.

Love v. North American Company, 229 Fed. l. c. 106.

White v. Delano, 270 Mo. 216.

Mercantile Trust Co. v. St. Louis & San Francisco R. R. Co., 69 Fed. 193.

Central Stock & Grain Co. v. Bedinger, 109 Fed. 926.

Richardson v. New Orleans, 102 Fed. 782.

The authorities relied upon by the petitioners and cited in their brief relative to the tracing of trust funds had to do with cases of actual insolvency and with the actual distribution of the assets of those insolvents among their creditors. This is not such a case. This is a reorganization through the offices of a court of equity by means of a receivership to carry out and effectuate a prearranged plan under which the stockholders and bondholders of the old company were to own the property after the usefulness of the receivership ceased.

However, the respondents in this case, in the tracing of the moneys illegally exacted from them, have measured up to the rigid rule announced in those cases.

Let us examine the agreed statement of facts filed in this case (Record pp. 329-333). The parts of that stipulation relevant to this issue may be stated thus:

1st. That, at all times from June 1, 1906 to May 27, 1913, the Railroad Company had in cash on hand an amount of money in excess of the claims of intervenors with interest thereon.

2nd. That the overcharges constituting intervenors' demands were not kept by defendant in a separate or designated account or fund, nor were they separated from other gross receipts of the Railroad Company derived from operation of its lines of railroad.

3d. That the moneys so collected by the railroad company were deposited in banks by the defendant in defendant's general account and that said banks did not keep said moneys in a separate account.

4th. That the Railroad Company checked out of its deposits in each of said banks during each year from June 1, 1906 to May 27, 1913, sums of money largely in excess of said overcharges.

5th. That said Railroad Company deposited in said banks during each of said years sums of money largely in excess of said alleged overcharges.

6th. That upon the appointment of the receivers, the Railroad Company turned over to said receivers, and said receivers received from the Railroad Company in cash, the sum of approximately \$334,000.00.

We say that these are the relevant parts of the stipulation because it is wholly immaterial what instructions the banks had and it is wholly immaterial whether these overcharges were separated from the other gross receipts of the Railroad Company, derived from the operation of its lines of raiload, and it is immateial whether the banks kept said moneys in a separate account.

Petitioners seem to lay great stress upon the agreed fact that the Railroad Company paid out, during the period in question, large sums of money for current expenses incurred in the ordinary operation of its property. We think that under the undisputed other facts in the case, this fact is wholly immaterial. It would be presumed, if the fact had not been stipulated, that the Railroad Company paid out large sums of money for current expenses incurred in the ordinary

operation of its property. Current expense, of course, is operating expense, and there was not a year from June 30, 1906, until May 27, 1913, except one, that the operating income of the Railroad Company did not exceed its operating expense, including taxes, by over eleven million dollars. The only year that its excess of operating income over operating expense did not amount to over eleven million dollars was the year ending June 30, 1908, when the excess amounted to \$9,944,600.89 (Record p. 163).

The facts, therefore, as established by this stipulation are these—that from June 30, 1906 to May 27, 1913, the Railway Company at all times had on hand, in cash, an amount of money in excess of intervenors' claims with interest; that the illegal exactions from the shippers were deposited by the Railroad Company in banks, with moneys of the Railroad Company in defendant's general account; that, during all of said time, the Railroad Company checked out of its deposits in said banks sums of money largely in excess of the overcharges and during all of said time deposited in said banks sums of money largely in excess of said overcharges, and had on hand and turned over to the receivers at the time of their appointment, on May 27, 1913, \$334,000.00.

The only inference, without straining the meaning of the language used in order to arrive at an inequitable result, that can be drawn from these agreed facts is that in none of the banks, in which the overcharges illegally exacted from the shippers were deposited, was the balance ever less than the amount of the overcharges deposited in that bank. The Railroad Company always had on hand more than the overcharges with interest. The overcharges were deposited in the banks with which the Railroad Company did business with moneys which actually belonged to the Railroad Company.

The deposits made from time to time equaled the withdrawals made from time to time and, therefore, the balances were never less than the amount of the overcharges.

On these facts and under the well-known rule approved by the authorities cited in the petitioners' brief, it will be presumed that the Railroad Company drew out of the banks its own money and left the trust company belonging to the shippers intact.

But, why should the strict rule applicable to actual insolvents, whose assets are actually being distributed by the court among the creditors of the insolvents, apply in all its strictness to this case? The railroad's operating income exceeded its operating expenses, including taxes, for a great many years by considerably over eleven million dollars. It had acquired two lines of road which, because of temporary conditions, were losing money, the Chicago & Eastern Illinois and the New Orleans, Texas & Mexico Railway Company, and it wanted to get rid of them (Bill of Complaint, Record pp. 2-4). A plan for the reorganization of the road, leaving these two roads out was agreed upon. A friendly creditor, who alleged that for the purpose of preserving the unity and integrity of the property of the Railroad Company it was necessary to have a receivership, brought an action in the Federal Court and prayed for the appointment of receivers. On the same day the Railroad Company joined with the complainant in a motion that the prayer in the bill for the appointment of receivers be granted (Record p. 11).

The receivers took charge and operated the properties profitably. In order to improve the property generally during the first two years of their operation, they increased the expenditures for maintenance of way and maintenance of equipment over three million dollars per year over what had been expended during the two years preceding the receivership (Record p. 478). They expended \$8,155,939.24 in redemptionship of equipment trust obligations and for improvements and additions to property which was not taken into capital account. They turned over to the new company in excess of five million dollars in cash. The preferred stockholders of the old company participated share for share in the new company without paying anything for their new stock. The common stockholders received stock in the new company equal to 85% of their holdings in the old company without paying anything for it (R. p. 529).

We do not contend that the Railroad Company did not have a right to effect a reorganization with the aid of a court of equity. We do contend that the same strict rule relating to the tracing of trust funds should not apply to such reorganization as applies to actual insolvents actually distributing their assets among their creditors through a court of equity. Rules of equity are supposed to be rules of conscience and they vary with varying conditions and circumstances and cases. It is not so long ago that a trust could not be impressed upon money which the trustees had commingled with his own funds because the identical dollars could not be traced. Under modern conditions that rule was inequitable and it was modified accordingly. The rule commonly known as the six months rule relating to the payment for necessary supplies is a rule of very modern origin. This court has pointed out the differences between these two kinds of receiverships-Louisville Trust Co. v. Louisville, etc., Ry., 174 U. S. 674, 43 L. Ed. 1130.

In that case, it was said:

"We must therefore recognize the fact, for it is a fact of common knowledge, that, whatever the legal rights of the parties may be, ordinarily foreclosures of railroad mortgages mean, not the destruction of all interest of the mortgagor and a transfer to the mortgagee alone of the full title, but that such proceedings are carried on in the interests of all parties who have any rights in the mortgaged property, whether as mortgagee, creditor, or mortgagor. Assuming that foreclosure proceedings may be carried on to some extent at least in the interests and for the benefit of both mortgagee and mortgagor (that is, bondholder and stockholder), we observe that no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation."

In the case of *Chicago*, R. I. & P. Ry. Co. v. Howard, 74 U. S. (7 Wall.) 392, 409 (19 L. Ed. 117), it is said:

"Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation and recognizes the rights of creditors to pursue it into whatsoever possession it may be transferred, unless it has passed into the hands of a bona fide purchaser; and the rule is well settled that stockholders are not entitled to any share of the capital stock, nor to any dividend of the properties until the debts of the corporation are paid."

To the same effect are the following cases:

Montgomery-Web Co. v. Dienelt, 133 Pa. 585, 19 Atl. 428, 430.

Central of Georgia Ry. Co. v. Paul, 93 Fed. 878, 884 (Fifth Circuit).

In the case of Mercantile Trust Company v. St. Louis, San Francisco Railroad Co., 69 Fed. 193, which arose under an earlier receivership of this same railroad, the court said:

"Two-fifths of all the money that went into the treasury of the company for fares of passengers represented unlawful and illegal exactions. That money it still has. No portion of it has been returned to the persons who were illegally forced to pay it. The sums

illegally exacted from the interveners have never been returned or tendered to them. It required eight years of litigation for the interveners to establish their own and the rights of the public in the premises. When, as sometimes happens, a railroad company desires to avoid the payment of debts and obligations incurred in the operation of its road, or to reduce the wages of its employes below a fair and reasonable compensation for their services-there are not many such companies. but occasionally there is one-it seeks the aid of a friendly creditor, through whose agency it is quickly placed in the hands of a receiver, and immediately a court of equity is asked and expected to do the mean things which the company itself was unable or ashamed to do. But it is believed this is the first instance in which a court of equity has been asked to become, in effect, something bordering very closely on a receiver of stolen goods, and urged to hold the ill-gotten gains in trust for the guilty party, and refuse to make restitution even of the smallest portion of them to the persons from whom they were unlawfully taken. High considerations of public policy, not less than the plainest principles of equity and justice, demand that the property of the defendant company in the custody of the court as a trust fund should be made to respond to the payment of these judgments."

In commingling this trust money with its own money, the railroad company violated its duty as trustee and the courts, in order to correct this situation, indulge every presumption for the beneficiary. The proposition that no such narrow doctrine as that contended for by counsel for the petitioners is applicable to the receivership in the instant case is shown by the case of Terre Haute and I. R. Co. v. Cox, 102 Fed. Rep. 825 (7th Circuit). In that case, the railroad company leased from another railroad company a line of road on a profit sharing basis. The court held that the share of the gross earnings reserved to the lessor in that lease was a trust fund and that the bond-holders of the lessor company, the interest on whose bonds

the lessee company was required by the terms of the lesse to pay from such gross earnings, were entitled to have the reserved percentage of the earnings, misapplied by the lessee company, restored by the receiver notwithstanding the fact that the lessee company had commingled those funds with its own and had operated the railroad at a loss.

The court said:

"But it is insisted by the Indianapolis Company that the excess of operating expenses over the earnings of the Peoria Railroad necessitated and justified the withholding of the thirty percentum, and the record shows that a large sum of money came into the hands of the receiver as a part of the estate at the time of their appointment. We may, therefore, we think, safely assume that that portion of the earnings which otherwise would have gone to the Peoria Company came into the hands of the Receivers, either as money at the time they took possession of the road, or as a benefit in virtue of the fact that they were consumed in the general operating expenses of the Indianapolis Company."

In that case, the court quoted from Peters v. Bain, 133 U. S. 670, 33 L. Ed. 696.

In this sort of a case, if in no other, the rule that where a trustee mixes trust funds with his own, the whole will be treated as a trust property, except so far as he, the trustee, may be able to distinguish what is his own, should be applied.

In the case of Central National Bank of Baltimore v. Connecticut Mutual Life Insurance Co., 104 U. S. 54, 26 L. Ed. 693, this rule is stated thus:

"That, so long as trust property can be traced and followed into other property into which it has been converted, the latter remains subject to the trust, and that if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own, are established doctrines of equity and apply in every case of a trust relation, and to moneys deposited in a bank account, and the debt thereby created, as well as to every other description of property."

The court, in this last cited case, reviews the English cases on this subject and points out that the original doctrine, requiring money to be earmarked, or specifically identified, had been abandoned in cases of trust relationship, and quotes from the opinion of Vice-Chancellor Sir W. Page Wood, as follows (l. c. 67):

"Vice-Chancellor Sir W. Page Wood, in Firth v. Cartland, 2 Hem. & M. 420, said that Pennell v. Defell rested upon and illustrated two established doctrines. One was that 'So long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust.' The second is, 'That if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own.'"

And again the court (l. c. 7.0.0.), (after quoting from the opinion of the Master of Rolls, Sir George Jessell), says:

"He adopts the principle of Lord Ellenborough's statement in Taylor v. Plumer, 3 M. & S. 562, that 'It makes no difference in reason or law into what other form different from the original the change may have been made, whether it be into that of promissory notes for the security of money which was produced by the sale of the goods of the principal, as in Scott v. Surman, Willes 400, or into other merchandise, as in Whitcomb v. Jacob, 1 Salk. 161, for the product or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained

to be such, and the right only ceases when the means of ascertainment fail.' But he dissents from the application of the rule made by Lord Ellenborough when the latter added, 'which is the case when the subject is turned into money and confounded in a general mass of the same description,' for equity will follow the money, even if put into a bag, or an undistinguishable mass, by taking out the same quantity. And the doctrine that money has no earmark must be taken as subject to the application of this rule. The court of appeals had previously applied the very rule as here stated in the case of Birt v. Burt, reported in a note to Ex parte Dale & Co., L. R. 11 Ch. D. 773."

This case of Central National Bank of Baltimore v. Connecticut Mutual Life Insurance Co., has been cited and followed by this court, by the lower federal courts and by nearly all of the state courts. It would be useless to attempt to give this vast mass of citations. We desire, however, to call the court's attention to the case of Smith v. Township of Au Gres, 150 Fed. 257, l. c. 260-265, (6th Circuit) and Standard Oil Company of Kentucky v. Hawkins, 74 Fed. 395 (7th Circuit).

The case of Smith v. Township of Au Gres contains an excellent discussion of the doctrine above announced and quotes from the opinion of Chancellor Kent in Hart v. Ten Eyek, 2 Johns, Ch. 62, l. c. 108, as follows:

"If a party having charge of the property of others so confounds it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property or lose it."

In the case of *Smith* v. *Mottley*, 150 Fed. 266 (6th Circuit) l. c. 268, the court refers to the Au Gres case, decided by it (150 Fed. 267) and reannounces the same doctrine, citing additional cases in support thereof.

The court said (l. c. 268) that it was shown that three times the amount of the trust fund claimed remained in the bank from the time of payment to the time of the assignment and came to the trustee. The court added:

"The burden of showing that his property has been wrongfully mingled in a mass of the property of the wrongdoer is upon the owner; but, when this is done, the burden shifts to the wrongdoer. It is for him to distinguish between his own property and that of the innocent party."

To revert a moment to the agreed statement of facts, and applying the rule announced in these cases, it was certainly the duty of the railroad company, if the balances in any of the banks were reduced below the amount of the overcharges deposited therein, to show such fact. This it did not do, but conceded that it always had on hand more than the amount of the overcharges, with interest, and that the deposits made from time to time in each of the banks into which overcharges had gone were equal to the withdrawals, and that it turned over to the receivers more than ten times the amount of the overcharges. It alone had the evidence and it is a fair inference that if the balance in any bank had been reduced below the amount of the overcharges in that bank, it would have shown that fact.

The cases cited by counsel for petitioners are not in conflict with the decision of the circuit court of appeals in this case or with the decision of the circuit court of appeals in the case of Love v. North American Company, 229 Fed. 103.

In the case of City of Litchfield v. Ballou, 114 U. S. 190, 29 Law Ed. 132, the city had issued bonds which this court held to be void, because they were issued in viola-

tion of the state constitution. Thereupon, the purchaser of the bonds brought a suit in equity on the theory that, notwithstanding the bonds were wholly invalid, the city was in possession of the money, received for the bonds, or its equivalent in property identified as having been procured with the proceeds of the bonds. The evidence showed that the money represented by the proceeds of the bonds had long since passed out of the hands of the city. However, the evidence showed that some of the proceeds of the bonds had gone into a water works plant. A large part. however, of the money, which had gone into the water works plant, was obtained by taxation, or from other resources of the city. It was not ascertainable how much. The land, on which the work was constructed, was purchased before the bonds were issued. The streets, through which the pipes were laid, were public property into which no money of the complainants had entered. In connection with the allegations in the bill that the city was in possession of the money, the court said (l. c. 133):

"The money received by the city from Ballou has long passed out of its possession and cannot be restored to complainant. Neither the specific money nor any other money is to be found in the safe of the city or anywhere else under its control."

Speaking about the tracing of the money into the water works property, this court used the language set out in petitioners' brief. In this case respondents have traced their money into the treasury of the railroad company and from the treasury of the railroad company into the hands of the receivers, and from the hands of the receivers into the hands of the railway company, and have showed that the stockholders of the old railroad company obtained over forty-five million (\$45,000,000.00) dollars of the stock

of the new railway company without paying anything for it.

Here respondents' money can be reclaimed and delivered without taking others' property with it and without injury to other persons, or interfering with others' rights. Moreover, the decree of the lower court appealed from in this Ballou case did not proceed upon the trust fund theory. It found a debt from the city to Ballou and impressed a lien upon the water works plant for the payment of that debt. This court held that that was as much within the condemnation of the constitutional provision as the express contracts evidenced by the bonds.

The case of Schuyler v. Littlefield, 232 U. S. 707, 58 Law Ed. 806, simply anonunces the familiar doctrine:

"Trust funds deposited by a trustee in his individual bank account are dissipated if the mingled fund is at any time wholly depleted, and cannot be treated as reappearing in sums subsequently deposited to the same account."

The next case cited is *Empire State Surety Co.* v. Carroll County, 194 Fed. 593 (U. S. C. C. A., 8th Circuit).

In this case Judge Sanborn (l. c. 604-605) undertakes to announce the rules governing the enforcement of a trust against the proceeds of an insolvent estate in the hands of a receiver. After announcing the general rule:

"It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof which came to the hands of the receiver" (citing l. c. 604 and a number of cases),

the court stated (l. c. 605) the second rule on this subject, which is as follows:

"Proof that a trustee mingled trust funds with his own and made payments out of the common fund is a sufficient identification of the remainder of that fund coming to the hands of the Receiver, not exceeding the smallest amount the fund contained subsequent to the commingling. (Board of Com'rs v. Strawn, 157 Fed. 49, 51, 84 C. C. A. 553, 555, 15 L. R. A. (N. S.) 1100; Weiss v. Haight & Freese Co., (C. C.) 152 Fed. 479; American Can Co. v. Williams, 178 Fed. 420, 423, 101 C. C. A. 634, 637) as trust property, because the legal presumption is that he regarded the law and neither paid out nor invested in other property the trust fund, but kept it sacred (Board of Com'rs v. Patterson, (C. C.) 149 Fed. 229, 232; Spokane County v. First National Bank, 68 Fed. 979, 16 C. C. A. 81)."

The next case cited is the case of Winfield v. Alva Security Bank, 232 Fed. 847 (U. S. C. C. A., 8th Circuit). In this case the complainants had purchased forged notes from the cashier of the Alva Bank. The complainants had credited the Alva Bank with the purchase price of these notes. Subsequently, these credits were entirely exhausted by drafts and there was no evidence that any part of the fund What was said by the ever reached the Alva Bank. court in this Alva Bank case, after finding that there was no evidence that any of the proceeds of the forged notes ever reached the bank, may have been right on the facts in that case, but is not authority on the facts in this case. Whatever may have been the principles announced in that case, they are clearly inapplicable to a reparation case like this, the principles governing which have been stated by the United States Circuit Court of Appeals in this and the Love case. Certainly the robust morality of the opinion of the United States Circuit Court of Appeals in the instant case must appeal to all fair-minded persons. One of the deep-seated convictions of Congress, as reflected by its legislation namely, the Carmack Amendment, and the Elkins Act, designed "to cut up by the roots every form of discrimination, favoritism, and inequality" (U. S. v. Koenig Coal Co., U. S. S. C. Adv. Opinion, May 1, 1926, No. 12, p. 488, l. c. 490), and by the provisions of the Commerce Act, was to protect the shipper in the wholly unequal fight with the carrier. It is very easy for the carrier to get the shipper's money, and Congress, as shown by its legislation, as construed by this court, is determined that the shipper shall get it back, and has even gone to the extent of authorizing the assessment of attornevs' fees in favor of the defrauded shipper. It is the clear intent of Congress, as shown in the Commerce Act, to restore to the shipper all unjust and unreasonable charges, plus interest from the date of payment, and attorneys' fees, thereby penalizing the carrier and predisposing the carrier to treat the shipper fairly and not litigate his just claims with him, in season and out of season, day and night, Sundays and holidays, for a period of twenty-two years, during which time an opportune financial receivership is invoked to entirely defeat the shipper, though the stockholders of the railroad company in receivership are enriched at the expense of its creditors to the extent of over forty-five millions of dollars.

The next case cited is the case of Federal State Bank v. McFarlin, 257 (U. S. C. C. A. 8th Cir.).

This case involved the distribution of assets of a bankrupt grain company and announces the proposition, citing the Carroll Company and Alva Bank cases, *supra*, that a claimant, whose property has helped to swell the general assets of a party, subsequently becoming bankrupt, has no prior right in those general assets without specific identification or tracing of the claimant's property. The next case cited, Scullin Steel Co. v. North American Co., 255 Fed. 945 (U. S. C. C. A., 8th Circuit) merely announces the proposition that, where there is collusion and fraud between the agent of the shipper and the agent of the carrier, and the carrier had no notice of such fraud and was not enriched by it, the money so siphoned from the shipper could not be treated as a preferred claim over other creditors of the carrier.

The next case cited is Weideman v. Newton Arms Co., 271 Fed. 302, 304 (C. C. A., 2nd Circuit), in which the court held that, where a trust claim was asserted on the ground that money had been secured from claimant by the false representations of a corporation, it was necessary to show, first, that such representations were relied on, and, second, trace their money into some particular property or fund which came into the hands of the receiver; and it is not sufficient to show that it was used by the corporation generally in its business.

In that case the court pointed out (l. c. 303) that the cash on hand had fluctuated down to zero, with liabilities of \$400,000.00, and that all that claimants could prove was that their money was spent in carrying on the business or procuring certain articles of machinery and the like which ultimately passed into the receiver's hands (l. c. 304).

How can this holding fit the facts in the instant case? The next case cited is *Titlow* v. *McCormick*, 236 Fed. 209, l. c. 214, 215. This case involved the distribution of the assets of an insolvent bank, where a trust was asserted by one claimant. This case cites and follows (l. c. 211) the Schuyler case, 232 U. S. 707, analyzed *supra*. This case also announces the doctrine (l. c. 214) that, where a trust fund has been commingled with other funds, still claimant is en-

titled to recover if there remained in the possession of the bank a sum of money equal to the amount due him, "It being the presumption of the law that, if moneys had been disbursed out of such fund, it was the money which the bank had the right to pay out, and not the money which was entrusted to it in a fiduciary capacity" (italics ours). Again, l. c. 215, the court announces the same rule, quoting the case of Brennan v. Tillinghast, 201 Fed. 609-614 (C. C. A., 6th Circuit), where the court declared that, when trust funds were mingled with other funds there was a presumption of law "That the sums first drawn out were for the moneys which the tort feasor had a right to expend in his own business, and that the balance which remained included the trust fund which he had no right to use" (italics ours).

The next case cited on this point is the case of *U. S.*National Bank of Centralia v. City of Centralia, 240 Fed. 93

(U. S. C. C. A., 9th Circuit). This case involved the distribution of the assets of an insolvent bank in a receiver's hands, and announces (l. c. 95) this proposition:

"The law impresses a trust upon funds (trust funds so misapplied, that is commingled with other funds) and to the extent that the said money or any portion thereof, either in its original or a substituted form, can be traced into the fund which came into the possession of the receiver, the appellee is entitled to a preference over the general creditors." (Citing the Titlow, Schuyler and Brennan cases, supra.)

The court held in the Centralia case that there was no proof that claimant's moneys ever came to the Centralia bank or were traceable to any fund that came to the receiver's hands, and, therefore, there could not be any recovery upon the trust theory. How this case applies to the facts of the instant case, we cannot conceive.

The case of Farmers National Bank of Burlington v. Pribble, 15 Fed. (2nd) 175, reannounced the rule stated in Empire State Surety Co. v. Carroll County, 194 Fed. 593, and in the other cases heretofore referred to. However, it reversed the lower court because there was no proof that any of the complainant's money was ever received by the Farmers Bank and therefore, of course, no proof of facts supporting a presumption that any part of plaintiff's money came into the hands of the receivers.

Some point is made by the counsel for petitioners and also by counsel for amicus curiae Missouri Pacific Railroad Company that the author of the opinion of the Circuit Court of Appeals in this case and one of the concurring judges therein concurred in the opinion of the same court in the Pribble case. Strangely, they seem to get some consolation from this fact, but all the fact indicates is that Judge Kenyon and Judge Stone were applying equitable rules to entirely different facts in the two cases. Under the facts in the instant case, the overcharges were deposited in various banks with moneys belonging to the railroad company. The railroad company always had on hand, in cash, more than the amount of the intervenor's claims. It is true the railroad company constantly withdrew the money it had on deposit in the banks but it is equally true that it constantly replenished the accounts of the banks in sums equal to the withdrawals. The railroad company turned over to the receivers really over six hundred thousand dollars in cash and the court, in both the instant case and in the Love case, held that presumptively the intervenor's money was in the fund turned over to the receivers. It is true that Judge Kenyon in this case held that the intervenor's money was not earmarked and could not be traced into any distinct fund in the hands of the receivers but that is not necessary in this case, or in any case.

In the Love case, the court said:

"(1) The question now might be properly asked, to whom do the excessive charges received by the Frisco Company for the transportation of freight belong? They certainly do not belong to the general creditors of the Frisco Company, nor to the bondholders, nor the Frisco Company itself. Without question they belong to the shippers. We must not be deceived as to the true status of this claim, nor allow the bond, or the fact that the claim is presented by the Corporation Commission, to blind us to the fact that the claim is one due to the shippers for excessive charges paid by them to the Frisco Company for transportation of freight. The shippers not only paid the lawful charge, but they did more. They paid an excessive charge. That payment was an illegal exaction, and, as against the railroad company, and volunteers, like the receivers, the money belonged to the shippers after the payment the same as before. It will be presumed that it was a part of the money in the treasury of the company which passed to the receivers. That money came into the hands of a court of equity. What ought such a court to have done with it? Surely it could do nothing but direct that it be returned to the shippers to whom it belonged. It having been paid to the bondholders, or for permanent betterment of the property for their benefit through the agency of a court of equity, that court, as a court of conscience, can do no less than direct its restoration."

Counsel for both the petitioners and for the Missouri Pacific Railroad Company seek to distinguish the Love case from this case. Counsel for the Missouri Pacific Railroad Company make a strange distinction indeed. They say that before the charges in the Love case were collected, it had been adjudicated that the money belonged to the shippers and the carrier merely collected it under the protection of supersedeas bond and not with any lawful claim

to title. They say, too, that since the claims in the Love case accrued within six months from the date of the receivership, specific tracing of funds was not necessary. It is manifest that neither counsel for petitioners nor for the Missouri Pacific Railroad Company understand the Love case.

Under the law of Okahoma, the Corporation Commission was given power to fix intrastate rates. By various orders. the Commission prescribed certain rates for the transportation of freight, considerably less than the rates then being charged by the carriers in Oklahoma. Under the law of Oklahoma, when rates are thus prescribed by the Commission, the carriers have a right to appeal direct to the supreme court of the state from the orders of the Commission and by giving a bond, they supersede the rates prescribed by the Commission and complained of by the carriers. In the Love case, appeals from the orders of the Commission were taken by the St. Louis and San Francisco Railroad Company and bonds were given as required by the Oklahoma statute and the rates prescribed by the Commission were thereby superseded. The Supreme Court of Oklahoma decided that the rates prescribed by the Commission were in some respects too low and that the rates fixed by the Railroad Companies were too high, and fixed the rates covered by the orders of the Commission at slightly more than the rates prescribed by the Commission but considerably less than the rates charged by the carriers. Therefore, while the carriers were collecting the excessive rates between the time that the orders of the Commission were made and the time they put the new rates as prescribed by the supreme court into effect, they violated only their common law duty to charge just and reasonable rates. In the instant case, the Railroad Company violated not only (1) its common law duty but it violated (2) Section one of the Act to Regulate Commerce and it acted (3) in the teeth of the order of the Commission finding that the rate that it was exacting was unreasonable and unjust.

It is true that in the Love case, the Railroad Company kept a record of the freight movements made between the date of the orders of the Commission and the date of the judgment of the supreme court, but how does that fact distinguish the Love case from the instant case? The Railroad Company did in the Love case what it did in this case. It commingled the shippers' money with its own. The record of the shipments afforded a means of determining the amount of the illegal exactions. Here the amount of the illegal exactions has been determined by the finding of the Interstate Commerce Commission, by the District Court of the United States for the Western District of Missouri and by the judgment of this court.

The case of Dayton-Goose Creek Ry. v. U. S., Interstate Commerce Commission, et al., 263 U. S. 456, decided by this court January 7, 1927, is by analogy an instructive case on this question of the relationship between a shipper from whom unreasonable and unjust rates have been exacted and the carrier exacting them under Section 6 of the Act, and of the effect of Section 15 (a) of the Act to Regulate Commerce, added to the act in 1920.

It was contended in that case by the Railroad Company that its income was derived from the transportation of freight and passengers; that the rates so collected were fair and reasonable to the shipper and were the rates published under Section 6 of the Act; that its earnings from such rates were the private property of the Railroad Company which could not by Congressional enactment, or other-

wise, be made a trust fund for the United States or for any other purpose without doing violence to the Fifth Amendment to the Constitution. In other words, while it was admitted that a carrier had "no right to collect or to demand of the shipper a rate that" was not in and of itself reasonable for the service, yet, since, as was contended, it obtained the legal and equitable title to the earnings which were derived from legally published rates which were at the same time reasonable and just to the shipper, Congress could not take such earnings from it without violating the Fifth Amendment to the Constitution, because the placing of an undue limitation upon the use of property was equivalent, under the Constitution, to taking of property without due process.

Paragraph five of Section 15 (a) declares that because it is impossible to establish uniform rates upon competitive traffic which will adequately sustain all the carriers needed to do the business, without giving some of them a net income in excess of a fair return, any carrier receiving such excess shall hold it in the manner thereafter prescribed as trustee for the United States.

The court, on this proposition said (l. c. 484):

"We have been greatly pressed with the argument that the cutting down of income actually received by the carrier for its service to a so-called fair return is a plain appropriation of its property without any compensation, that the income it receives for the use of its property is as much protected by the Fifth Amendment as the property itself. The statute declares the carrier to be only a trustee for the excess over a fair return received by it. Though in its possession, the excess never becomes its property and it accepts custody of the product of all the rates with this understanding. It is clear, therefore, that the carrier never has such a title to the excess as to ren-

der the recapture of it by the Government a taking without due process' (italics ours).

By a parity of reasoning and by virtue of Section one of the Act, which is declaratory of the common law, when a carrier exacts from a shipper an excess over a just and reasonable rate, such excess never becomes its property and the carrier accepts custody of such excess with the understanding that it has no right to take or hold more than a just and reasonable rate. If, because of Section six of the Act, a carrier obtained both the legal and the equitable title to an unjust and unreasonable rate or to a product of all of its rates in excess of a reasonable return, then neither the Commission nor Congress would have power to take such excess away from it without compensation.

By a consideration of the whole act to regulate commerce and by a consideration of the basic rights of the shipper and the carrier and from the very necessity of things, unjust and unreasonable, and therefore unlawful, exactions should be restored to the shipper whether there has been a prearranged reorganization receivership or not. Thus, the law fixing the rights and obligations of the carrier, the individual shippers and the public will be observed.

It is not so long ago that favorite shippers could put competitors out of business because they were able to obtain better rates, either by rebates or by discriminations, than their competitors. Suppose two competing shippers on two competing railroads—because of the publication of an unjust and unreasonable rate, unlawful exactions in large amounts are made from both shippers. Both shippers, after the procedural steps in the Interstate Commerce Commission have been taken, obtain judgments against the respective railroads for the restoration of the excess over a

just and reasonable rate. One of the railroads goes into a pre-arranged, consent receivership for the purpose of reorganizing. The other road does not. One shipper has restored to him in full the moneys illegally exacted from him. The reorganized railroad says to the other shipper—"No, we have gone into a court of equity and you can only share potluck with our general creditors who voluntarily became creditors." In such a case, what becomes of the uniformity which was one of the primary purposes of the act to regulate commerce? The answer is manifest.

We will not be betrayed into making invidious comparisons between Judge Kenyon and Judge Sanborn, as do counsel for the Missouri Pacific Railroad Company. We have the greatest respect for both of those learned judges. We can say this, however, with perfect propriety, that the opinion of Judge Kenyon, in this case, reflects a court of conscience working at its best. Judge Kenyon says: "Every consideration of equity and fair dealing demands that these claims should not be lost in a labyrinth of technicalities." The principle underlying this point of view should motivate every court of equity. It motivated the court in the case of Commonwealth ex rel. v. Scott, 112 Kentucky 252, wherein it is said:

"But it will be noted that these arguments emanate from those whose interest and effort it is to defeat the action; to defeat the recovery; to defeat all recovery of their client. From that standpoint it is not criticised. But the court must look beyond this position. They cannot be satisfied with considering merely reasons why it should not be done, but must look also to those why it should be. Conceded a tax wrongfully levied and collected of a community, in violation of the Constitution. The citizen has paid it promptly, it being mingled with legal taxes, which should be paid promptly that Government might be supported. The sum of such illegal tax is in the hands of the collector or county

court. The citizens who paid it, not the municipality nor the collector, are entitled to it. Question for the courts: How to quickly, justly, inexpensively restore to the citizen his own? Now, if either form or substance of right must be sacrificed or one made to conform to the other, will the courts, in this day of practical action, hesitate as to which will be made to yield? As justice is the end and the procedure the means, we may well regulate the latter to attain the former."

#### IV.

Without reference to their other equities, intervenors are entitled to recover these excess charges from the new company, the St. Louis-San Francisco Railway Company, under the rule announced in the case of Northern Pacific Railway Company v. Boyd, 228 U. S., and other cases to the same effect, supra, relating to the right of a creditor to recover against the reorganized company, where the stockholders of the original debtor company have been given an interest in the reorganized company.

On this point we wish to call attention to the three following cases which are apposite:

Central of Georgia Railway Company v. Paul, 93 Fed. Rep. 878 (C. C. A., 5th Cir.).

Guardian Trust Company v. Cambria Steel Company et al., 210 Fed. 696, l. c. 721 (C. C. A., 8th Cir.).

Walden v. Bodley, 14 Pet. 164, 10 L. Ed. 398.

In the case of Central of Georgia Railway Company v. Paul, Mrs. Paul intervened in the receivership case of the Central Railroad and Banking Company of Georgia, apparently after the property of that company had been sold under foreclosure. The theory of her bill of intervention was that as a stockholder of one of the subsidiary companies of the Central Railroad and Banking Company of Georgia, she was entitled to dividends on stock of such subsidiary com-

pany, which had been accruing, during a period of twenty years prior to the receivership; that the dividends so due to her constituted a trust fund, which, prior to the receivership, was held by the railroad company, and, since that time, by the Receivers and that she had an equitable lien upon the property and assets of the Central Railroad Company, which was superior to that of all other persons. In its answer, the defendant admitted that the amount of dividends were correctly stated in the intervention, but denied that the dividends were ever held as a trust fund. After announcing the doctrine underlying the decision in the case of Northern Pacific Railway Company v. Boyd, supra, the court, through Judge Pardee, stated on p. 885 of the opinion:

"In one of the many orders issued by the court in the liquidation proceedings was an invitation to the general creditors of the Central Railroad and Banking Company of Georgia to intervene and assert their claims against the funds derived from the sale of the 'overflow property,' in pursuance of which the present appellee intervened, asserting her claim. To recover the entire amount of her demand from the new company, on the view herein presented, she might have been driven to a bill in equity; but as there has been a full bearing in the present proceedings, and the appellant has been permitted to make a full defense, and as the decree appealed from does full equity between the parties, it may well be affirmed without further pleading. Taking this view of the case, it is unnecessary to consider whether there is any trust or other fund still under control of the court out of which appellee can be paid, or whether the appellee's claim is entitled to consideration as one in which a special or general deposit to her credit was made in the banking department of the Central Railroad and Banking Company of Georgia. The decree appealed from is affirmed" (italics ours).

In the case of Guardian Trust Company v. The Cambria Steel Co. et al., the trust company was a creditor of the Kan-

sas City Suburban Belt Railroad Company. Under the reorganization plan adopted in the receivership of that company, and of the Kansas City, Pittsburg and Gulf Railway Company, the Southern Railway was organized to take over the Belt Company property, the railroad company property, and the property of a dock company at Port Arthur, Texas. The stockholders of all three of the defendant companies, including the Belt Company, were taken into the reorganized company, and participated in the stock of the reorganized company. The same doctrine as that applied in the case of Northern Pacific Railway Company v. Boyd was applied in this Guardian Trust Company case, and it was held that the Southern Railway Company was liable to the creditors of the Belt Company. The issues between the Southern Railway Company and the Trust Company were framed by an intervening petition, filed by the Southern Railway Company, and by an answer filed by the Trust Company. The Trust Company asked for no affirmative relief against the Southern Company. It only prayed that the bill of the Southern Company be dismissed. It was contended that the Trust Company was not entitled to a decree for the payment of its claim against the Southern Company because the Trust Company filed no cross bill and made no specific prayer for said relief in its answer. This court disposed of that contention against the Southern Company, and in opinion, l. c. p. 722, quoted from the case of Walden v. Bodley, 14 Pet. at p. 164, as follows:

<sup>&</sup>quot;It would be a reproach to the administration of justice if, in this case, the parties should be left by the decision of this court apparently as remote from a final determination of it as they were forty years ago. It is true, the answer prays merely for a dissolution of the injunction, and that the bill may be dismissed. But the court have, by the bill, answer and evidence, the equities

of the parties before them, and, having jurisdiction of the main points, they may settle the whole matter. A court of equity cannot act upon a case which is not fairly made by the bill and answer. But it is not necessary that these should point out in detail the means which the court should adopt in giving relief."

On this point we also cite the following cases:

Guaranty Trust Company v. Missouri Pacific Ry. Co., 238 Fed. 812, l. c. 814-816.

McDonald v. Nebraska, 101 Fed. 171, l. c. 177-182.
 Chicago Ry. Co. v. Howard, 7 Wall. 392, 409, 74 U.
 S. 392, 409, 19 L. Ed. 117.

Louisville Trust Co. v. L. N. A. & C. Ry. Co., 174 U. S. 674.

The last two of which are quoted supra.

### V.

Intervenors are entitled to recover upon the theory of the rule underlying the right of preferential payment of claims for labor, supplies, etc.

The finding on this point and the reasoning of the Master's report are so persuasive that we have excerpted the same and incorporate it herewith in this brief (R. pp. 186-190).

The operating income of defendant railroad company from June, 1906, to May 27th was over \$92,000,000.00. During the receivership the operating revenue largely exceeded the operating expense, including taxes. The receivers turned over to the railroad company over \$5,000,000.00 after paying out large sums of money from operating income as interest on bonded indebtedness and for betterments to the road and to equipment and for the purchase of new equipment.

Equity regards the substance and not the form. These claims represent money illegally exacted from the shippers.

They are not and never have been voluntary creditors of the defendant railroad. The test of the preferential equity of a claim of this kind is its consideration. The consideration for those claims is the money which the railroad company wrongfully and unlawfully obtained from the shippers. Money, even more than supplies, labor, etc., is necessary for the ordinary operation of a railroad in the usual course of its business. Freight rates are the lifeblood of railroad operations. Without them no railroad could own a wheel, much less turn one. Under both reason and authority these claims are preferential under this rule. As was said by the Circuit Court of Appeals in the case of Love v. North American Company, in which claims facts identical with the facts in this case were involved:

"'Petitioner's claim also comes within the rule which underlies the right to a preferential payment. Freight rates are the lifeblood of railroad operation. It will not be contradicted that if there were no freight rates paid in the United States not a wheel would turn on any road. What does the law say in regard to the allowance of preferences? We accept the laws as established by the Supreme Court of the United States and

by this court, as follows:

'The class of claims which under the decisions of the supreme court may lawfully receive an equitable preference in payment out of the income or out of the corpus of the property of a mortgaged railroad over the bondholders secured by a prior mortgage is limited to claims incurred for the current expenses of the ordinary operation of the mortgaged property in the usual course of the business of the mortgagor. The test of the preferential equity of a claim is its consideration. If its consideration was a current expense of the ordinary operation of the property of the mortgagor incurred in the usual course of its business for labor, supplies and like things necessary for the operation of the railroad, within a limited time, usually not exceeding six months anterior to the appoint-

ment of the receiver, the claim may be preferred in pay-

ment, otherwise it may not be. . .

'We think that what has been heretofore said establishes that the claim of the shippers is a claim incurred "for the current expenses of the ordinary operation of the railroad in the usual course of business of the road." On principle it cannot be distinguished from payments to sureties who have signed bonds to stay the execution of judgments and claims for holders of unused tickets for refunds and many other like charges which are habitually allowed and have been allowed in the receivership of the Frisco Company."

It is urged by learned counsel for the defendant and the railway company that the bondholders received no benefit from these illegal exactions. It seems to the Master that it might as fairly be said that the bondholders received no benefit from the legal freight rates collected by this company. While it must be presumed under the facts shown that the shippers' money always remained in the treasury of the company, yet the shippers' money operated to swell the funds in the treasury of the defendant, and thus made it possible or at least aided in making it possible for the bondholders to receive the interest on their bonds.

It is again urged that the preferential allowance of these claims would impair the vested interest of the bondholders. Surely it cannot be reasonably claimed that the bondholders contracted for the security of unreasonable, unjust and unlawful freight charges. When they took their bonds they took them with the law written into them which forbade the charging of an unreasonable and unjust freight rate. It follows that the bondholders acquired no interest of any kind in these excessive charges. Therefore, the preferential allowance of these claims takes from the bondholders nothing to which they are entitled.

It is further urged by the defendant railroad and the railway company that under the authority of the case of Chicago & Alton Railroad Company v. U. S. & Mex. Trust Co., 225 Fed. 940, these claims cannot be given preferential allowance. In the opinion of the Master that case, except to the extent that it announces the rule underlying the preferential equity of claims of this kind, has no application to this case. In all respects where that case is applicable to this case it is in harmony with the Love case. In that case Chicago & Alton Railroad Company was attempting to have allowed as a preferred claim car repair balances and money paid for the Orient Railroad for fuel and for the Orient's proportionate share of overcharge and loss and damage claims on interline shipments of freight received by the Chicago & Alton from the Orient. In that case there was no surplus income and no diversion of income. The Chicago & Alton was not a shipper from whom the Orient had unlawfully exacted freight rates. It was a carrier and had a balance due it under some interline agreement. It had paid to others some overcharges of some kind, part of which were chargeable to the Orient. Under the authority of the Love case the claims involved in the Chicago & Alton would not be entitled to preferential allowance.

It is contended by the defense that interveners' claims are not preferentially allowable under this rule in any event because they accrued more than six months prior to the appointment of the receivers. The Master cannot agree with this contention. It must be borne in mind that these interveners are not voluntary creditors. It must also be borne in mind that while the shippers' causes of action accrued at the time the illegal exactions were made, yet

their rights of action did not accrue until the Interstate Commerce Commission acted in January, 1914. rights of action did not become complete until June 15. 1914, which was the limit of time given by the Interstate Commerce Commission for the defendant to pay these claims. In the case of Love v. North American Company. supra, the six months rule was not technically applied. In the Love case the orders of the Corporation Commission fixing the rates were made on July 3, 7 and 31 and on September 14, 1911. The appeal from the orders taken by the railroad company was not decided until December 5. 1912. The judgment of the supreme court made the rates approved by it effective as of the dates of the original orders. Therefore, part of the overcharges in the Love case were collected as much as twenty months before the receivership.

However, the six months rule is not an inflexible rule. The period before the receivership in which claims of this character must accrue depends upon circumstances. The six months period is usually fixed because usually that is a reasonable period, but it is discretionary with courts to allow a longer period if circumstances warrant it. The time must be reasonable, and what is a reasonable time depends upon the facts of each particular case.

North American v. Lamont, 69 Fed. 496. Southern Ry. Co. v. Carnegie, 76 Fed. 496. Blair v. Ry. Co., 22 Fed. 471.

Mr. Justice Brewer says in Blair v. R. R. Co., 22 Fed. 471:

"There is no arbitrary time prescribed, and it should be only such reasonable time as, in the nature of things and in the ordinary course of business, would be sufficient to have such claims settled and paid. Six months is the longest time I have noticed as yet given. Ordinarily I think that is ample. Perhaps, in some large concerns, with extensive lines of road and a complicated business, a longer time might be necessary."

Where equity seemed to demand it, the federal courts have not hesitated to depart from the short six months rule. In Atkins v. Railroad Company, 3 Hughes 307, a claim which accrued twenty-two months before the receivership was allowed. In Hale v. Frost, 99 U. S. 389, a three-year period was allowed. In Burnham v. Bowen, 111 U. S. 776, eleven months was allowed. In Union Trust Company v. Morrison, 125 U. S. 591, a three-year period was allowed. In New York Guaranty Trust Company v. Ry. Co., 83 Fed. 365-370, a claim for cable delivered twenty-six months before the receivership was allowed. In that case the court said:

"The time that elapsed between the delivery of the cable and the appointment of the receiver by the state court would therefore be about twenty-six months, or a little over two years. But it is to be observed that the intervener began suit in the state court of Washington before the receiver was appointed, on October 5, 1893, which would be about twelve months after the delivery of the cable. It recovered judgment on April 3, 1896, which was subsequent to the appointment of the receiver by the state court. The period of time that transpired between the time that the intervener instituted its action and the appointment of the receiver cannot properly be included in this computation of time. Such delay as there was, incidental to the proceedings in the state court of Washington, cannot be imputed to nor tend to the prejudice of the intervener's rights. Without elaborating upon the proposition any further, we are of the opinion that the claim for the cable in question should be made a preferred debt."

It is plain that whatever delay there was in this case, chargeable largely to the vigorous opposition made by the Railroad Company, cannot be imputed to or tend to prejudice the interveners in their rights. The Master rules this point against the defendant and the railway company.

There is no conflict between the Love case and the case of Chicago & Alton R. R. Co. v. United States & Mexican Trust Company, et al., 225 Fed. 940, upon this point. In that case, the complainant was seeking to recover for car repairs, loss and damage claims on shipments of freight and overcharges. The complainant's claims in that case amounted to nothing more than simple debts of the Orient Company for labor done and for money advanced by the intervenor for the mortgagor company (225 Fed. l. c. 943). The question of the right of a shipper to recover overcharges was not involved in any way, shape or form in that case.

As we have heretofore stated, rules of equity are not inflexible but are elastic and adapt themselves to the particular right to be recognized and enforced.

As we have heretofore stated, the principle commonly called the six months' rule is of modern origin. It was considered inequitable that persons furnishing supplies or labor to a railroad company, and presumptively contracting for payment out of current income, should lose their money because of the intervention of a court of equity in the management of a railroad property. The courts reasoned that the bondholders of a railroad company impliedly contracted that persons furnishing supplies within a reasonable time before the receivership would be paid out of current income and would be paid out of the corpus of the property if current income were diverted. What was

a reasonable time within which such claims could accrue and be recognized depended upon the facts and circumstances. It is usually thought that if a claim is more than six months old, the creditor did not even impliedly contract for payment out of current income but sold to the Railroad Company on the general credit of the Railroad Company. In this case, the Railroad Company obtained the intervenors' money against their consent. The reasons which underlie the rule under which supply creditors are entitled to preferential payment should certainly apply to these forced claimants.

#### VI.

A court of equity, as a matter of public policy, will order the overcharges in question repaid to the interveners, the shippers and representatives of shippers of live stock.

A court of equity, as a matter of public policy, will order these overcharges repaid to the shippers. In charging and collecting freight rates a carrier is exercising a prerogative of sovereignty. It owes a public duty to charge only just and reasonable rates.

"A franchise which, in England, is a branch of the royal prerogative, subsisting in the hands of a subject, in this country can only be derived from the Legislature. Franchises are here, as in England, privileges of the sovereign in the hands of the subject. Whoever claims an exclusive privilege with us must show a grant from the legislature. A privilege or immunity of a public nature, which cannot be legally exercised without legislative grant, is a franchise.

"Inasmuch as it is the duty of the Government, with respect to the welfare of the public in general and of trade in particular, to provide safe and commodious ways of communication, whence flows the right of the state to oblige those who make use of the ways it provides to contribute to the expense of making and main-

taining them, i. e., the right to levy tolls, it follows that the right to make roads and levy tolls is a prerogative of sovereignty, and, in the hands of a subject, is a franchise, which cannot be legally exercised without

legislative authority. . . .

"This franchise of the defendant is a privilege of the sovereign in the hands of a subject. The subject is, indeed, in the present case, an artificial being; but the sovereign might have placed this privilege in the hands of a natural person, and it might have been his property, as it is the defendant's property."

Blake v. Railroad, 19 Minn. 418. See, also, Morgan v. Louisiana, 93 U. S. 217.

Railroads are common carriers and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts, and "it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interest of the public in the progress of trade and traffic by new methods of intercourse and transportation." See, also, the case of Southern California Railway Company v. Rutherford et al., supra, and the case of Mercantile Trust Company v. St. Louis & San Francisco Railroad Company, 69 Fed. 193.

However, this point is also conclusively settled by the case of Love v. North American Company, 229 Fed., l. c. 107.

In the case of the Mercantile Trust Company v. St. Louis & S. F. Ry. Co., 69 Fed. 193, l. c. 198, Judge Caldwell trenchantly said:

"But it is believed this is the first instance in which a court of equity has been asked to become, in effect, something bordering very closely on a receiver of stolen goods, and urged to hold the ill-gotten gains in trust for the guilty party, and refuse to make restitution even of the smallest portion of them to the persons from whom they were unlawfully taken. High considerations of public policy, not less than the plainest principles of equity and justice, demand that the property of the defendant company in the custody of the court as a trust fund should be made to respond to the payment of these judgments. And if the lien of the judgments had expired and the general order relating to the payment of debts did not comprehend them under the admitted facts of the case a special order would have to be made for their payment."

The rule thus announced by Judge Caldwell was reannounced by this court in the Love case, 229 Fed., l. c. 107, as follows:

"There is another aspect in which petitioners' equity appears equally strong. The railroad company got this money into its treasury by superseding rates that were fixed by authority of the state. When those rates were sustained, the carrier was bound to restore its excessive exactions. This was a duty not only to the shippers. It was a public duty owing to the state whose orders had been superseded. It is a duty which this court and the supreme court have always been scrupulously careful to safeguard when superseding rates pending judicial inquiry as to their validity. It is a duty which a court of equity that has taken over the business of a public carrier, by means of a receivership, ought to be equally careful to enforce."

# VII.

Neither the reorganization nor the trust fund theory is inconsistent with or abrogated by the remedy for the collection of overcharges prescribed by Section 16 of the Act.

It is urged by petitioners that, because of the provisions of Section 16 of the Act to Regulate Commerce, the status of interveners is that of general unsecured creditors, with no right to priority over anyone. Under this section of the act, if the Interstate Commerce Commission shall determine

that a shipper is entitled to an award of damages, it shall make an order directing the carrier to pay the sum to which the shipper is entitled on or before a day named. If the carrier does not comply with this order for the payment of money, then the shipper may file in the district court of proper jurisdiction, or in any state court of general jurisdiction, having jurisdiction of the parties, a petition setting forth the causes for which he claims damages and the order of the Commission in the premises. Such suit shall then proceed in all respects like other civil suits for damages, except that the order of the Commission is made prima facie evidence of the facts therein stated.

Does this section of the act make the shipper, as to unlawful exactions of freight charges, a general creditor of the carried against the shipper's will? The United States Circuit Court of Appeals held that it did not. This section does prescribe a remedy at law which the shipper must pursue. But it does not take away from him his equitable remedy to thereafter impress a trust, if the latter remedy is necessary in order that he may get back that which was unlawfully taken from him. Too much significance must not be attached to the word "damages." If a citizen is robbed of his money, he is damaged. If his property is taken away from him by fraud, he is damaged. If it is taken away from him by duress, he is damaged, and in all three cases he can sue the wrongdoer in tort for damages. He may also sue to impress a trust. The status of the interveners cannot be determined by stressing mere procedural terms. We must consider the substance, and not the mere form. We must look back to the facts which lie at the root of the transaction. It is the basic facts that must determine the rights of the intervenors and their remedies. We must not blind ourselves to the fact that the

claims of intervenors are claims due to the shippers for excessive charges paid by them to the Railroad Company for the transportation of freight.

It is urged by learned counsel for petitioners and by counsel for the Missouri Pacific Railroad Company, amicus curiae, that all the remedies of the shipper, except the remedy prescribed in section 16 of the act, are abrogated by the act. Section 22 of the act provides:

"Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

It is true that this section and section 9 of the act have been limited in their scope by the Supreme Court of the United States. The case of Texas & Pacific Ry. Co. v. Abilene Cotton Oil Company, 204 U.S. 426, is the leading case on the interpretation of these sections. In that case the plaintiff brought suit to recover unreasonable freight charges without having secured any finding from the Interstate Commerce Commission as to the extent to which the rate was unreasonable and unjust. As has been heretofore stated, the purpose of the Act to Regulate Commerce was to secure uniformity of rates and to prevent discriminations of all kinds, as well as to prohibit the charging of unjust and unreasonable rates. The supreme court held that if shippers could invoke the aid of the courts without first going to the Interstate Commerce Commission, then one of the objects of the act-to-wit, the securing of uniformity-would be destroyed. One shipper might go into one court and secure a judgment. Another shipper, similarly situated, might go into another court and fail. Two shippers might appeal to the same court and get different results, depending upon the evidence presented.

Rebates could be secured by fictitious suits, and all of the evils of this character which the act sought to prevent would be revived.

A shipper cannot maintain an action against a common carrier to obtain relief from an alleged unreasonable freight rate exacted from him for an interstate shipment without reference to any previous action by the Interstate Commerce Commission, where such rate has been filed with that commission and promulgated as provided by the act to regulate commerce, and is the rate which it is the duty of the carrier, under that act, to enforce against shippers until changed in accordance with the provisions of that statute, since the independent right of an individual originally to maintain actions to obtain pecuniary redress for violation of the act conferred by section 9 be confined to such wrongs as can consistently with the context of the act be redressed without previous action by the commission; and the provision of section 22 that nothing therein "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," cannot be construed as continuing in shippers a common-law right the continued existence of which would be absolutely inconsistent with the provisions of the statute. In other words, the act cannot be held to destroy itself.

204 U. S., l. c. p. 446.

It is, therefore, clear that those common-law remedies, the continued existence of which in the shipper would be absolutely inconsistent with the act, are abrogated. However, it is equally clear that those common-law remedies, the continued existence of which would not be inconsistent with the act, are reserved to the shipper. In considering

this proposition it must be borne in mind that appeals by implication are not favored. This rule is clearly stated by the supreme court in this Abilene Cotton Oil Company case:

"In testing the correctness of this proposition, we concede that we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common-law right existing at the date of its enactment unless that result is imperatively required; that is to say, unless it is found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

Of course, there is nothing in the remedy these interveners are now pursuing which is inconsistent with the Act to Regulate Commerce, or which is repugnant to the Act to Regulate Commerce. On the contrary, the existence of this remedy in this case is necessary in order to bring about and insure the uniformity which the Act to Regulate Commerce was designed to secure. The carriers who remained solvent repaid to the shippers the illegal exactions. This remedy puts the carrier in this case on the same footing with the other carriers.

Intervenors contended, and still contend, that there was nothing in the Act to Regulate Commerce depriving them of the remedy pursued in this case, nor is there anything else depriving them of such remedy.

The basic theory of the trust fund doctrine is the right to recover money wrongfully and unlawfully and by duress collected (39 Cyc. 591; Oelrichs v. Williams and Oelrichs v. Spain, 15 Wall. 221, 21 L. Ed. l. c. 44) and the fundamental legal maxim is, "Ubi jus, ibi remedium," and, "Equity will not suffer a wrong without a remedy."

Broom on Legal Maxims (8th Ed., p. 101 et seq.), citing the celebrated case of Ashby v. White, 2d Ld. Ryam. 953, and also the famous opinion of Chief Justice Marshall in the case of Marbury v. Madison, 1 Cr. 137, 2d L. Ed., p. 60.

In Pomeroy's Equitable Jurisprudence, Vol. I, Sec. 423, this great authority on equity jurisprudence discusses the above corresponding equity maxim and points out the universality of its application.

Its application has been so often exemplified that it would be useless to attempt to give more than a few controlling authorities.

Toledo, A. A. & N. M. Ry. Co. v. Penn. Co. et al., 54 Fed. 746, l. c. 751, 752.

Southern California Ry. Co. v. Rutherford, et al., (Circuit Court, Southern District of California, June 30, 1894), 62 Fed. l. c. 797, 798.

The federal and state courts have often invoked and applied this maxim of equity, and the other maxims, namely, "Equity delights to do justice and that not by halves," or, as more commonly expressed, "Equity will do complete justice." Again, "Equity regards that as done, which ought to be done"; and "Equity regards substance rather than form"; and "Equity imputes an intention to fulfill an obligation." In equity there is no wrong without a remedy.

Harrigan v. Gilchrist, 99 N. W. 909.

Mercantile Trust Co. v. St. Louis & San Francisco Ry. Co., Ogden et al. Intervenors, 69 Fed. 193. Sweet v. The Montpelier Savings Bank & Trust Co., 69 Kan. 641 (77 Pac. 538).

Mathews v. Forslund, 112 Mich. 591.

Barksdale et al. v. Finney et al., 14 Grattan, 338.

Williams v. Young, 81 Atlantic 1118.

Trader's Bank v. Fraser, 162 Mich. 315, l. c. 318.
Converse v. Sickles, 44 N. Y. Supp. 1080 (affirmed in 161 N. Y. 666).

Sugar Refining Company v. Fancher, 145 N. Y. 552, 1. c. 561. The cases just cited also announce the proposition that a judgment at law is, in many cases, not such an election of the remedy as will preclude a bill in equity to impress a trust, because there is no inconsistency whatever between the two proceedings.

In pursuing the remedy pointed out by Section 16 of the Interstate Commerce Act, intervenors manifestly made no election, because that was the only remedy available, and because that remedy had to be pursued to its final conclusion before any other remedy became available (Southern Pac. Co. v. Goldfield Co., 220 Fed. Rep. 14, l. c. 18).

Since there was no freedom of choice, the doctrine of election of remedies cannot apply in this case (20 C. J., p. 21).

These points are so well demonstrated in the opinion of the United States Circuit Court of Appeals (R. pp. 764-767) that no further discussion is needed.

## VIII.

The claims of intervenors for said excess charges should be paid with interest from the date of their illegal collection.

Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co., 269 U. S. 217, l. c. 238, 239, 240,

where the court holds:

"It has been the uniform practice of the Commission to recognize as an element of the damages, loss of interest on charges unlawfully exacted; and, in ordering reparation, it has usually included as a part of the damages such interest from the date of the payment."

Citing many cases of this court and of the Commission in the decision and in Notes 10 and 11 supporting this conclusion. This case conclusively settles the question of interest. This rule applies both to the trust fund theory and the reorganization theory of liability. Petitioners' cases cannot apply because in this case, after a three-year receivership, a delay of eleven years has been caused by the present railway company.

#### IX.

Interveners are entitled to recover attorneys' fees taxed as costs in the litigation in the District Court of the United States for the Western Division of the Western District of Missouri.

For the reasons assigned in Point IV of this brief, intervenors are entitled to payment of these costs from the defendant railway company. They are also entitled to recover payment thereof for another reason. When the receivers were appointed they were, by the order of the District Court, authorized to

"institute and prosecute such suits in their own names as receivers or in the name of the company, as their attorneys may advise; to defend such suits as may be brought against them and those now pending or hereafter brought against the company which affect or may affect the property of which they are now or may become receivers."

Pursuant to this order the receivers, through their attorneys, appeared in the cases in the District Court of the United States for the Western Division of the Western District of Missouri and conducted the defense of the cases therein. They appealed from the judgment of the District Court at Kansas City to the Circuit Court of Appeals. About the time of the appeal to the Circuit Court of Appeals the Railway Company took charge of the litigation and through its attorneys conducted the defense to these cases. Either the receivers or the railway company caused a surety com-

pany to make an appeal bond in the name of the defendant railroad company for thirty-five hundred dollars (\$3500.00), conditioned that the defendant would answer for all costs if it failed to make good its appeal. All of the costs in these cases taxed against the defendant railroad company were incurred and made by the action of the receivers. Under these circumstances ought these costs in equity be paid by the receivers and, therefore, by the railway company?

We submit that these costs should be treated as part of the expense of the administration of the estate.

"Equity delights to look behind the forms in which things are clothed, at the real substance of them."

While it may be that technically the receivers did not incur these costs, yet they did cause them to be incurred. They did this under the provisions of the order of their appointment. To all intents and purposes the district court, in which the receivership case was pending, conducted this litigation and caused these costs to be incurred. We earnestly insist that it would be very inequitable for a court of equity to cause these costs to be incurred and then refuse to compel its officers to pay them. Of course, if the receiver should pay them, then the railway company should pay them.

## X.

The intervenors are neither precluded by laches from the recovery of these illegal exactions nor by any bar arising out of interlocutory orders or the final decree.

We cannot add anything to the argument of the Master (R. pp. 167-173) or to the argument of Judge Kenyon in the opinion of the circuit court of appeals (R. pp. 749, 755) on the question of laches.

So far as any bar arising out of the interlocutory orders or the final decree is concerned, counsel for petitioners mistate the rule (Petitioners' Brief pp. 49, 50). It is true that one who intervenes in an equity suit is bound by all previous orders to the same extent as if he had been a party to such suit when such orders were made, but that is not all. Such an intervenor has the same rights as if he had been a party at the time the orders were made.

In the case of Swift & Co. v. Black Panther Oil Gas Co., 224 Fed. 20, l. c. 29, the circuit court said:

"This general rule is that the intervener is in the same situation, bound by the same orders, has the same right, and is subject to the same estoppels as though he had been a party from the commencement of the suit" (italies ours).

In the case of French v. Gapen, 105 U. S. 509, this court said of an intervention filed after the sale and after the final decree:

"To their intervention no exception is taken by any of the parties. They are, therefore, to all intents and purposes now to be treated as though they had originally been made defendants and set up their demands" (italics ours).

In the case of Rice, et al. v. Durham Water Co., 91 Fed. l. c. 434, the court said:

"Leave to intervene was by order and after intervention the new parties are treated, to all intents and purposes, as if they had been original parties to the suit" (italics ours).

If intervenors have the same right and are subject to the same estoppels as though they had been parties from the commencement of the suit, then, of course, they have the right to have their cases tried as if their interventions had been filed on the day the bill was filed by the North American Company. They are in exactly the same position as they would have been in had their interventions been on file but undisposed of at the time the orders referred to by counsel and the final decree were entered. The order granting them leave to intervene was not excepted to and if, as was stated by this court in the French case, supra, they are now to be treated as though they had originally been made defendants and set up their demands, they are, of course, unaffected by the interlocutory orders or the final decree.

Judge Kenyon, in the opinion of the United States Circuit Court of Appeals erroneously decided this proposition and his opinion is in conflict with the case of Swift & Co. v. Black Panther Oil Gas Co., supra, and with the case of French v. Gapen, supra, decided by this court.

## XI.

# Construction of the word "arise" in the final decree.

The decision of the circuit court of appeals that intervenors' claims "arose" after the entry of the final decree, and that they were not precluded by the final decree and the order of confirmation of sale from asserting said claims, is correct on this point. Opinion of the United States Circuit Court of Appeals (R. pp. 755-760) 14 Fed. 2nd, l. c. 291-293, where the court reviews the contention of petitioners on this point at length, states the applicable facts, holds that the purchaser of the property, the railway company, expressly agreed, under the order

of court, to pay the claims of intervenors, if established, and cites many applicable authorities as to the meaning of the term, "arise." We can add nothing to the opinion on this point.

United States v. Heth, 3 Cranch, 398, 413 (2 L. Ed. 479).

Van Meter v. Coal Mining Co., 88 Iowa, 92, 98, 55 N. W. 106, 108.

Doughty v. Funk, 15 Okl. 643, 84 P. 484, 4 L. R. A. (N. S.) 1029.

Macon Grocery Co. v. Atlantic Coast Line R. Co., 215 U. S. 501, 30 S. Ct. 184, 54 L. Ed. 300.

In re Bogart, Fed. Cas. No. 1596.

Moran v. Moran, 144 Iowa, 451, 123 N. W. 202, 30 L. R. A. (N. S.) 898.

Love, et al. v. North American Co., et al., 229 F. 103, 106, 143 C. C. A. 379, 382.

Southern Pacific Co., et al. v. Darnell, 245 U. S. 531, 38 S. Ct. 186, 62 L. Ed. 451.

Louisville Cement Co. v. Int. Com Comm., 246 U. S. 638, 38 S. Ct. 408, 62 L. Ed. 914.

# Conclusion.

We respectfully submit that the judgment of the United States Circuit Court of Appeals in this case should be affirmed.

Respectfully submitted,

S. H. COWAN,
DAVID A. MURPHY,
JOHN S. LEAHY,
WALTER H. SAUNDERS,
Attorneys for Respondents.





FILED

OCT 4 1928

WM. R. STANSBURY

IN THE

# SUPPEME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

ST. LOUIS AND SAR FRANCISCO
RAILROAD COMPANY and ST.
LOUIS-SAN FRANCISCO RAILWAY
COMPANY,
Patition

Petitioners, No. 5.7.7...

E. B. SPILLER at al.,

72.

Respondents.

PETITION OF MISSOURI PACIFIC RALECAD
COMPANY FOR LEAVE TO FILE
AMEQUE CURTAE BRIEF.

EDWARD J. WHITE, THOMAS T. RAILEY, Counsel for latervaner.

Railway Exchange Bldg., St. Louis, Mo.

#### IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY.

Petitioners, > No...

VS.

E. B. SPILLER et al.,

Respondents.

## PETITION OF MISSOURI PACIFIC RALBOAD COMPANY FOR LEAVE TO FILE AMICUS CURIAE BRIEF.

Comes now the Missouri Pacific Railroad Company, a Missouri corporation, by its undersigned attorneys, hereinafter for convenience termed intervener, and presents to this Court the fact that claims outstanding against it approximating, without interest, a million dollars, are vitally affected by the decision of the Circuit Court of Appeals of the Eighth Circuit in this case, which decision it is earnestly contended is in conflict, in many important respects, with the decisions of this Court and with the decisions of other Circuit Courts of Appeals, and intervener, therefore, joins with the petitioners, St. Louis and San Francisco Railroad Company et al., in urging that certiorari to review the decision of the Circuit Court of Appeals be granted, and prays for leave to enter its appearance herein and file amicus curiae brief.

The interest of intervener in this litigation is by reason of the following facts:

The Missouri Pacific Railroad Company, during 1917, through foreclosure proceedings, acquired the property of The Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company. The orders and proceedings in the receivership cases were very similar to those in evidence in the case at bar. prior companies referred to, together with other Missouri carriers, in 1905 enjoined the enforcement of certain Missouri statutory rates, and under and pursuant to the authority and orders of the United States District Court for the Western District of Missouri proceeded to collect their tariff rates then on file, which were in excess of the statutory rates. The statutory rates were upheld by this Court in 1913, and numerous claims for overcharges arose predicated on the difference between the tariff rates collected and the statutory rates. These overcharge claims were solicited by a certain claim adjuster, who, during 1916, filed in the Missouri Pacific-Iron Mountain

receivership proceedings claims approximating one million dollars. The several hundred original petitions filed by him in behalf of the various claimants were in the nature of actions for an accounting predicated on the trust-fund theory—that is to say, upon the theory that title to the overcharges never passed to the carriers, and that the overcharge funds were ab initio the property of the shipper. These claims are still pending and this issue is still being urged in connection with both the procedure and the classification of the claim<sub>is</sub>.

The Special Master, as well as administrative Judges Hook, Sanborn and Faris, have so far uniformly held that said overcharges having been collected under and pursuant to a decree of a court of competent jurisdiction both the legal and equitable title to the money passed to the carrier at the time of the collection, and that the cause of action arose upon the reversal of the judgment, the remedy being an action for money had and received predicated on the right to restitution. None of the claims has yet reached the Circuit Court of Appeals. The views of the Special Master and the respective administrative Judges are very concisely set forth in the unreported opinion of Judge Sanborn, the relevant portion of which appears in the appendix hereof, wherein he follows the reasoning of this Court in the leading case of Bank of United States v. Bank of Washington, 6 Pet. 8 (cited with approval in Arkadelphia Company v. Ry. Co., 249 U. S. 145), to the effect that:

"The reversal of the judgment cannot have a retroactive operation and make void that which was lawful when done. The reversal of the judgment gives a new right."

The overcharge claims against intervener which were collected under and pursuant to a decree of a court of competent jurisdiction which was afterwards reversed are closely analogous to the claims in the case at bar, wherein the rates were collected under and pursuant to a lawfully filed tariff, which rates were afterwards determined to have been unreasonably high. The remedy in the former instance is in the nature of an action for money had and received, predicated on the right to restitution, which right arises upon the reversal of the decree. The right in the latter instance is reparation and the remedy is a statutory action for damages.

United States Circuit Judges Hook and Sanborn and District Judge Faris, in the decisions above referred to, have followed the long line of decisions quoted from in the brief of petitioner, St. Louis and San Francisco Railroad Company, for writ of certiorari in this case, and the decision of the Court of Appeals for the Eighth Judicial Circuit in this case is diametrically opposed to those decisions and to the rule of property established thereby, upon which your intervener herein, it is respectfully contended, has a right to rely.

By reason of the foregoing facts intervener avers that its rights are vitally affected and greatly prejudiced by each and all of the following findings of the Circuit Court of Appeals in this case, to wit:

- (1) That claimants were not guilty of laches in failing to file their claims, and it was error to dismiss their intervening petitions on that ground (R. 722).
- (2) That said claims arose after the entry of the final decree and claimants were not precluded by the final decree and order of confirmation of sale from asserting said claims (R. 722).
- (3) That the Railroad Company, in collecting rates which the Commission later found to be unjust and unreasonable, and, therefore, unlawful, became a trustee ex maleficio (R. 722).
- (4) That claimants could invoke the trust-fund doctrine, even though the moneys collected could not be traced into any distinct fund or into any specific property (R. 718).
- (5) That an equitable action, based on the trust-fund doctrine, was not inconsistent with the remedy by reparation prescribed by the Act to Regulate Commerce (R. 719).
- (6) That claimants were entitled to have their claims established as preferential claims superior to the rights of other creditors, including the bondholders, in the amounts of the judgments obtained by them against the Railroad Company, with interest from August 1, 1916, a date more than three years after the date of appointment of the Receivers on May 27, 1913 (R. 722).

<del>-6-</del>
Wherefore, intervener prays that certiorari be granted
and that intervener be permitted to intervene herein and
file amicus curiae briofs.  Mhiti  Raily
Counsel for Intervener, Missouri Pacific
Railroad Company.
State of Missouri, City of St. Louis.

Thos. T. Railey, being duly sworn, makes oath and says that he is attorney for intervener in the above cause, that he has read the foregoing petition for leave to intervene and knows the contents thereof, and that the allegations

therein are true as he verily believes

Subscribed and sworn to before me this 26th. day of August, 1926.

My commission expires. June 28 Hz 1919

Notary Public.

Leow Colling

#### APPENDIX.

Extract from unreported opinion of Circuit Judge Walter H. Sanborn, filed March 5, 1923, holding that overcharges collected under and pursuant to a decree of a court of competent jurisdiction pending Missouri rate litigation did not constitute trust funds.

"The question in this case, therefore, is not whether or not the mortgagor company became and is liable to pay to the interveners the amount of the excessive charges it collected and interest thereon. It is admitted that the mortgagor company is so liable. The interveners claim more.

"They argue that the mortgagor company unlawfully or wrongfully collected these charges; that one who unlawfully or wrongfully collects or obtains money or property of another from him becomes immediately a trustee ex maleficio of that money or property for the benefit of him from whom he obtains it; and that, therefore, the mortgagor company became, the instant it collected any of these excessive charges, a trustee ex maleficio of the moneys thus collected for the benefit of the interveners. The soundness of the major premise of this syllogism is challenged and the crucial question in this case is, did the mortgagor company unlawfully or wrongfully collect these excessive charges and thereby make itself a trustee ex maleficio of the moneys it collected as fast as it received them?

"From the time the District Court first held the statutory rates of 1905 and 1907 confiscatory and issued its first restraining order or injunction until the Supreme Court reversed its final decree, that holding was the law of the land on the subject of these rates so far as the parties to the suit before that Court were concerned, because that Court was the judicial tribunal in which the power was then vested and on which the duty was then imposed to adjudge what rates were confiscatory and what were not. While its holding and adjudication on which all its injunctions were founded and its injunctive orders remained in force, it was unlawful and wrongful for the officers of the state or others to put in force the statutory rates of 1905 and 1907, and the collection of the higher earlier-established rates by the mortgagor company was lawful and right, because it was the duty of that company to collect compensatory rates, and the Court in which the power to determine what rates were compensatory was vested had held that the lower statutory rates were confiscatory and unconstitutional. During this time the putting in force or enforcement of the use of these statutory rates by the officers of the state. their agents or others would have been unlawful, wrongful and punishable by fine or imprisonment for violation of the injunction, because during that time that judicial determination was the law of the land as between the parties to that suit. If the Supreme Court had affirmed the holding of the District Court such would have been the rights and relations of these parties and such the law upon this subject still. Its reversal of that holding adjudged that that holding was mistaken and erroneous, and vested in the interveners a right to a reparation of the losses they had sustained by the collection of the excessive rates, of the amount of which those excessive rates and interest on them were competent evidence. But that reversal did not so relate back as to render the mortgagor company's collection of the excessive charges, which was rightful and lawful when it was made, wrongful and unlawful when it was made, nor did it have the effect to charge the mortgagor company which lawfully and rightfully made the collection and applied the moneys collected to the payment of its current expenses and obligations while the District Court's holding and injunctions were in force, as a trustee ex maleficio of those moneys as fast as it collected them.

"In this state of the case the interveners are entitled, upon proper proof, to the allowance of their claims, as general unsecured creditors of the mortgagor company, but the Court is unable to find, in the collection by the mortgagor company of these excessive charges in accordance with the holdings, orders and injunctions of the District Court in force at the time of their collection, any fraud, misrepresentation, deceit, illegality, wrong or breach of moral or legal duty that taints the conscience of the mortgagor company or any of its officers whose duty it was to advise and direct its course when these charges were collected, or that justifies a charge of this mortgagor company as a trustee ex maleficio or a trustee de son tort of the moneys collected from these excessive charges while the adjudications and injunctions of the District Court were in force.

"Judge James A. Seddon, the Special Master in this case; Judge George C. Hitchcock, the Special Master in the case of Guaranty Trust Company of New York, and Benjamin F. Edwards, trustees, against the Missouri Pacific Railway Company in the matter of the intervention of the Laclede Gas Light Company, after an exhaustive study and consideration of the question here involved and a review of the authorities, and Judge Hook, upon consideration of exceptions to the report of Judge Hitchcock, have reached the conclusion which has just been stated,

and the present consideration of the question has convinced the Court that their decisions were right.

"Reference is made to the reports of Special Masters Hitchcock and Seddon for citations and reviews of the authorities pertinent to the question that has been considered.

"This question was not discussed, determined or adjudged by the Court in St. Louis, Iron Mountain & Southern Ry. Co. v. McKnight, 244 U. S. 368, 369, 371, 372, 375: Bellamy v. St. Louis, Iron Mountain Ry. Co., 220 Fed. 876, 877; Love v. North American Company, 229 Fed. 103, and other like cases, in which the mortgagor was not justified in its collection of excessive charges by the holding and injunctions in its favor in full force of the judicial tribunal authorized to determine the question confiscatory or not or in which the mortgagor company did not claim such protection, or in which the question at issue was the general liability of the company to pay the shippers an amount equal to the excessive charges and interest, and no question of its taking those collections as a trustee ex maleficio was deliberately considered or decided. And remarks of the Courts in their opinions in such cases that might have been persuasive if they had been deliberately made after presentation and discussion of the very questions here at issue are not very persuasive, much less authoritative here, under the oft-quoted rule announced by Chief Justice Marshall in these words:

"'It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The

question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated' (Cohens v. Virginia, 19 U. S. 264, 399; King v. Pomeroy, 121 Fed. 287, 294; Traer v. Fowler, 114 Fed. 810, 816).

"On the other hand, such established and indisputable rules of law and equity as that a subsisting order, decree or judgment of a court having jurisdiction of the subject matter and the parties, though subsequently reversed for error, is binding upon them and constitutes a sufficient justification for acts done under and in accordance of it before its reversal, and that such a reversal does not have such a retroactive effect as to make unlawful or wrong, at the times they are done, acts lawfully done at such times in accordance with the order, judgment or decree before its reversal. United States v. Bank of Washington, 31 U. S. 716; Gat v. Smith, 39 N. H. 171, 176; Field v. Anderson, 103 Ill. 403, 406; 2 Freeman on Judgments, Sec. 482; Ruling Case Law, Sec. 245, ought not to be disregarded.

"The result is that the interveners were not entitled to a discovery or accounting in equity on the ground that the mortgagor company became a trustee *ex maleficio* of the moneys collected from the excessive charges at the times it collected them, because it did not become such a trustee,"



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IN THE

WM. B. STANSBURY CLERK

# SUPPEME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

ST. LOUIS & SAN FRANCISCO MAIL-ROAD COMPANY and ST. LOUIS-SAN TRANCISCO MAILWAY COM-PANY.

Patitioners

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E. B. SPILLER OF MA

Rearendents.

Ho. 577.

On Writ of O'relocate to the United States Circuit Court of Appeals for the Highth Circuits

SOUND A WHILE STOUGHT, BALES

Council for Assistan Carine.

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#### IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

ST. LOUIS & SAN FRANCISCO RAIL-ROAD COMPANY and ST. LOUIS-SAN FRANCISCO RAILWAY COM-PANY,

Petitioners, No. 577.

VS.

E. B. SPILLER et al.,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

# BRIEF OF AMICUS CURIAE, MISSOURI PACIFIC RAILROAD COMPANY.

The facts in the Spillers reparation claim are not, in our opinion, to be distinguished from any ordinary reparation award. The excess charges under consideration were exacted after the passage of the Hepburn Act of June 29, 1906 (34 Stat. L. 584), to wit, from August 29, 1906, to November 17, 1908. During the time that these charges were collected, the Act provided that an opinion

of the Commission, to be effective, must be accompanied by an appropriate order, and a mere previous expression of the Commission's opinion that the rates in question were unreasonable, without an order entered thereon, was, after the passage of the Hepburn Act, a mere nullity (C. B. & Q. R. R. Co. v. Merriam & Millard, 297 Fed. 1, 3).

If the decision of the Circuit Court of Appeals in this case correctly announces the law, then hundreds of rates that are being collected by the carriers today in good faith and in reliance upon duly published tariffs may, by the retroactive effect of some future reparation award, be considered trust funds. The mere statement of such a situation seems so utterly repugnant to the underlying principles of the Interstate Commerce Act as to make argument unnecessary. The matter is one of great concern to every investor in railroad securities. The decision, both in its direct effect and its effect by analogy, is far reaching.

We are particularly concerned because of the fact that over a million dollars of overcharge claims, alleged to have been collected under the protection of an injunction decree during the Missouri rate litigation and predicated upon this so-called trust fund theory, are still pending before the Special Master in the Missouri Pacific-Iron Mountain Receivership cases, and the attorneys for these claimants are attempting to construe the decision of the Circuit Court of Appeals in this case as an authority to the effect that charges in excess of the statutory rate,

although collected under and pursuant to a decree of a court of competent jurisdiction, are trust funds, and that they need only be traced into the general "cash account," as distinguished from deposits or checking accounts in particular banks or depositories.

## To Apply the Theory of a Constructive Trust to Reparation Awards Is to Invoke a Remedy Predicated on Principles Incompatible With Those Underlying the Act Itself.

Section 22 of the Interstate Commerce Act preserved all remedies then existing at common law. This language has been restricted to remedies consistent with the intent and purpose of the Act itself (T. & P. Ry. Co. v. Cotton Oil Co., 204 U. S. 426, 442; Penn. R. R. Co. v. Coal Co., 230 U. S. 184, 197). The so-called trust fund theory attempted to be invoked in this case is not consistent with the theory of the Act. It presupposes and is predicated upon the existence of a situation which the Act itself does not contemplate, and which is not in accord with its intent and purposes. This being true, the trust fund theory, admittedly, cannot be resorted to as a remedy supplemental to the award of damages in the nature of reparation.

The inconsistency between the underlying facts on which the trust fund theory is predicated is best emphasized by first attempting to show the analogy between reparation and restitution, and then, by recognized authorities, disclosing how utterly repugnant to the principles and facts underlying restitution are those underlying the theory of a constructive trust ab initio.

Restitution deals with funds or property acquired under a judgment or decree of a court of competent jurisdiction, which funds or property, by reason of the reversal of the judgment or decree, should not in equity be retained by the unsuccessful litigant. Reparation is an analogous statutory remedy invoked for the purpose of requiring a carrier to return to a shipper charges which, though legally collected under a valid tariff, are afterwards determined by the Commission to have been unreasonable. The subsequent determination of the unreasonableness of the charge collected does not make reparation mandatory. Because of the discrimination that might result as between localities, if such reparation were awarded, or for other similar good reason, the Commission may refuse to order unreasonable rates refunded.

Rates collected under a valid tariff are lawfully collected, just as that which is done under a valid decree is lawful, though afterwards, by the reversal of the decree, determined to have been wrongful. The reversal of the decree does not have the retroactive effect of making that which was done under its protection unlawful, nor should an award of reparation, by retroactive effect, make unlawful a tariff charge which has up to that time constituted the only lawful tariff charge that the carrier

could assess. Restitution and reparation both proceed upon the theory that what was done was, for the time being, lawfully done, and having been done under and pursuant to authority of the law no retroactive order can make the act unlawful, although it may determine that it was wrongful, and, therefore, justify reparation or restitution.

In Arkadelphia Milling Co. v. Ry. Co., 249 U. S. 134, 145-6, this Court had under consideration a situation where a carrier, under and pursuant to a decree of a court of competent jurisdiction, collected rates in excess of those which the state statute declared to be the only lawful intrastate rates. The decree of the lower court was reversed, and in applying the principles of restitution this Court said:

"It is a typical case for an application of the principle of restitution, and the District Court properly held the Commission to be the representative of the shippers for this purpose."

A statutory action for overcharges is, of course, to be distinguished from the principles under consideration. We mean by this that if a statute provides for the recovery of all charges collected in excess of a specified amount, and enforcement of the statute is enjoined by a decree, which is later reversed, the erroneous decree may not nullify the statute, but merely suspend it. But such a statutory action is merely an action for money had

and received. No principles of equity are involved—there is no element of a trust fund—the statute merely provides for the recovery of a certain amount of money upon proof of certain existing facts. Where there is no such statutory remedy, or where for other reasons equity is invoked to either supply a complete remedy or a remedy supplementing the statutory remedy, then equity in such a case will apply the principles of restitution rather than the principles underlying constructive trusts.

We can see no material distinction between the lawfulness of the collection of a charge under a decree of a court of competent jurisdiction, as in the Arkadelphia case, and the lawfulness of the collection of charges under a subsisting tariff duly filed with the Commission, but later involved in a reparation award. The purpose of the act, and the underlying principles that lead to that purpose, must control, rather than the strained construction of some such word as "unlawful," as it appears in Section 1 of the Act, and which, we think, was intended under such facts as these to convey the idea of "wrongful," as that term is used in reparation decisions, as distinguished from "unlawful."

As said in the leading case of Penn. R. R. Co. v. Coal Mining Co., 230 U. S. 184, 197:

"The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

Judge Sanborn, in his opinion in this case (North American Co. v. R. R. Co., 288 Fed. 612, 629-30), aptly says:

"The railroad company collected these legally established rates. It had the decision and direction of the highest judicial tribunal in the land for its justification, and this Court is of the opinion that its collection of these rates was not unlawful. The prohibition of section 1 and that of section 6 must be read and interpreted together, and the correct construction of them is that the specific prohibition of section 6 constitutes an exception from the general prohibition of section 1. A construction that each prohibition is of equal force and equally applicable in such case as that in hand would impose upon the carrier a penalty of a violation of section 1 if it complied with section 6, and the penalty of a violation of section 6, if it complied with section 1, and an interpretation which leads to such an absurdity ought to be rejected."

Having thus briefly shown the similarity in the underlying principles which, in the one instance, have prompted the remedy based on equitable principles termed restitution, and in the other instance, a statutory remedy known as reparation, it shall now be our purpose, by

citation of authorities defining restitution and distinguishing it from the principles applicable to constructive trusts, to thereby show that the same incompatibility must exist between the principles underlying reparation and those underlying the so-called trust-fund theory.

Restitution proceeds upon the theory that that which was done was lawfully done. There is no element of fraud, misrepresentation, deceit, illegality, wrong, or breach of moral or legal duty that taints the conscience of the party acting under the erroneous decree. The only duress is the duress of the decree, and the decree is, for the time being, the law of the land. A third party acquiring title for valuable consideration under such an erroneous decree, though acting with full knowledge of the pendency of the appeal, acquires title of which he is not divested by the reversal of the decree on which his title rests. The decree is, for the time being, presumed to be lawful and right, and there is no retroactive presumption that any party to the suit has proceeded upon a different theory. Just as the Commission may find that rates collected have been unreasonable, and yet decline to award reparation, so, likewise, may a court refuse to grant restitution. It is not founded upon any supposed wrong on the part of the unsuccessful litigant in enforcing the judgment, but upon the ground that in equity and in good conscience he ought, after reversal, to restore to the appellant everything of value which he received on account of the erroneous judgment, and, as a

consequence, it has been held that restitution is not a mere right, but is ex gratia, resting in the exercise of a sound discretion, and that a court will not order it when the justice of the case does not call for it.

The so-called trust-fund theory is predicated upon the contrary assumption that what was done was constructively unlawful ab initio, thereby constituting the wrongdoer a trustee ex maleficio or a trustee de son tort. Such a trust fund may be pursued into the possession of a purchaser for value unless he, moreover, be an innocent purchaser. There is no presumption that anyone has proceeded upon the theory that what was done was lawfully done. On the contrary, it is presumed that the wrongdoer has spent his own funds first, and that the trust money has remained at the bottom of the deposit. The privilege of recovering trust property is a matter of right, as distingushed from discretion. It discards the idea of a debt, a lien, or a claim for damages, and proceeds upon the theory that the party in possession was at no time entitled to treat the fund or property as his own, and presumes that all parties with knowledge of the facts so understood the situation and conducted themselves

Disposing of certain overcharge claims collected under facts similar to those in the Arkadelphia case, supra, and in all respects similar to those pending against *amicus* curiae, Missouri Pacific Railroad Company, to which reference has heretofore been made, Judge Seddon, Special Master in the M. K. & T. receivership proceedings, in an unreported opinion, has so ably distinguished the principles underlying the two theories that we adopt his language as our own, to wit:

"The claim of a right to sue as and for an unlawful act committed at the time the alleged illegal exaction of the charges was made, and the right to have restitution of the amount of such charges, are in their natures so essentially antagonistic that they cannot exist together. The former right arises, if at all, at the time the charges were collected, and is predicated on the assumption that the exaction and collection of the charges was entirely unlawful, that the remedy was merely suspended by the injunction, and that it was revived by the reversal of the judgment and the consequent dissolution of the injunc-The latter cause of action (restitution) does not arise until the dissolution of the injunction, when it comes into existence from an entirely different consideration. It is predicated upon the assumption that the act of exacting and collecting the charge was not unlawful. It is not, as is supposed by the learned counsel for the intervener, a case of the choice between two remedies for the same cause of action. The causes of action are distinctly antagonistie."

The relevant portion of Judge Sanborn's unreported opinion, affirming Judge Seddon's report, from which we have just quoted, will be found in the appendix of "Petition of Missouri Pacific Railroad Company for Leave to File Amicus Curiae Brief," heretofore filed in this cause.

We briefly quote from Judge Sanborn's opinion:

"From the time the District Court first held the statutory rates of 1905 and 1907 confiscatory and issued its first restraining order or injunction until the Supreme Court reversed its final decree, that holding was the law of the land on the subject of these rates so far as the parties to the suit before that court were concerned, because that court was the judicial tribunal in which the power was then vested and on which the duty was then imposed to adjudge what rates were confiscatory and what were not. Its reversal of that holding adjudged that that holding was mistaken and erroneous, and vested in the interveners a right to a reparation of the losses they had sustained by the collection of the excessive rates, of the amount of which those excessive rates and interest on them were competent evidence. But that reversal did not so relate back as to render the mortgagor company's collection of the excessive charges, which was rightful and lawful when it was made, wrongful and unlawful when it was made, nor did it have the effect to charge the mortgagor company which lawfully and rightfully made the collection and applied the moneys collected to the payment of its current expenses and obligations while the District Court's holding and injunctions were in force, as a trustee ex maleficio of those moneys as fast as it collected them."

The right of restitution, as distinguished from any trust-fund theory, will never be more clearly defined than in the leading case of Bank of United States v. Bank of Washington, 6 Pet. 8, 19, wherein the Supreme Court of the United States, emphasizing the fact that the reversal of the judgment does not make void that which was done under it, but simply gives a new right or cause of action termed restitution, said:

"The reversal of the judgment cannot have a retrospective operation, and make void that which was lawful when done. The reversal of the judgment gives a new right or cause of action against the parties to the judgment and creates a legal obligation on their part to restore what the other party has lost by reason of the erroneous judgment; and, as between the parties to the judgment, there is all the privity necessary to sustain and enforce such right; but, as to strangers, there is no such privity; and if no legal right existed when the money was paid to recover it back, no such right could be created by notice of an intention so to do."

The Court then proceeds to point out the distinction that:

"Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it, and the law, at the very time of payment, creates the obligation to refund it."

For additional authorities to the same effect see 2 Ruling Case Law, pp. 291-293; Gay v. Smith, 38 N. H. 171, 176; Field v. Anderson, 103 Ill. 403, 406; Macklin v. Allenberg, 100 Mo. 337, 345; City v. Gas Light Co., 82 Mo.

349, 355; Dodson v. Butler, 101 Ark. 416, 420; McAusland v. Pundt, 1 Neb. 211, 244; R. R. Co. v. Bisbee, 18 Fla. 60, 65; Fidelity Trust Co. v. Banking Co., 119 Ky. 675, 682; Bridges v. McAllister, 106 Ky. 791, 797; Harrigan v. Gilchrist, 99 N. W. 909, 1009 (Wis.); Dunfee v. Childs, 53 S. E. 209, 216 (W. Va.).

"The claim of the right to sue as and for an unlawful act committed at the time the alleged illegal exaction of the charges was made, and the right to have restitution of the amount of such charges, are, in their natures so essentially antagonistic that they cannot exist together." This apt comparison between the trust-fund theory and restitution, applies with equal force to a comparison between reparation and constructive trusts. They are not only inconsistent, but predicated upon diametrically opposing principles. One proceeds upon the theory that what was done was, for the time being, lawfully done; the other presupposes that the acquisition of the funds has been without legal or equitable justification.

To use the language of Judge Sanborn (288 Fed. 631):

"The theory and indispensable basis of the alleged trust is that the ownership of the moneys collected by the company from the excessive charges never passed from the interveners to the collector, but that the latter took and its successors in interest still hold those moneys in trust for the owners, the interveners. The theory and the indispensable basis for the remedy by reparation provided by the Act to

Regulate Commerce is that the interveners lost the title and onership of the moneys collected by the company, were damaged by that loss, and that those damages are to be paid by the reparation provided by Act to Regulate Commerce."

We, therefore, respectfully submit that to apply to reparation claims the equitable principles, remedies and presumptions that may be invoked with respect to constructive trusts, is to ado a supplemental remedy which is, of necessity, predicated upon principles inconsistent with those underlying the Interstate Commerce Act itself, and the two remedies, being thus inconsistent, cannot exist together.

## Concerning the Tracing of the Alleged Trust Funds.

The facts respecting the tracing of the alleged trust funds are stipulated (Tr., p. 331). They are attempted to be traced into the total cash account, as disclosed by the books of the prior company, and it is shown that at no time did the combined cash in the various depositories and in the possession of the various departments of the railroad fall below the amount of these claims. They are not traced into any particular bank account or deposit. Judge Kenyon, disposing of this issue, speaking for the Circuit Court of Appeals in this case, says: "It is not necessary to show that the identical money received has been placed in a separate account, or to trace the identical funds" (Tr., p. 764). That they were

wrong in this opinion has since been tacitly conceded by two of the Judges who participated in the opinion, for both Judges Kenyon and Stone concur in a more recent decision of the same Circuit Court of Appeals to the contrary, to wit, Farmers National Bank of Burlington v. Pribble, 15 Fed. (2nd) 175, 176, 179. It is quite evident that Judge Sanborn, who wrote the opinion in the case last cited, has convinced the judges who are responsible for the opinion under review, of their error. We pass this feature of the case without further comment, as it will doubtless be fully briefed by counsel for petitioners.

We do desire to emphasize, however, that the tracing of these funds into a particular bank deposit, instead of into the mere bookkeeping account of cash on hand, would not in this case have sufficed if the views expressed in the preceding paragraphs of this brief are well taken. Such tracing of the funds by showing that there was at all times a sufficient amount in the deposit to take care of the claim is predicated upon the presumption that the alleged wrongdoer has dealt with the money as a trust fund, and that he has withdrawn his own funds first. But such a presumption is no more warranted in a reparation suit than it is in a claim for restitution. As we have heretofore stated, both reparation and restitution are predicated upon the theory that what was done was lawfully done. Title to the funds passing by the decree or collected under a valid tariff vests in the party so collecting them, and there can be no presumption that he

has at any time prior to the reversal of the decree or the award of reparation dealt with the funds other than as his own property.

The legal presumption is in favor of the correctness of a judgment (Burr v. Des Moines Co., 1 Wall. 99, 103; Macklin v. Allenberg, 100 Mo. 337, 345). If an appeal has been taken, the party acquiring title under the decree of the lower court is not to suppose that the judgment will be reversed, but the contrary (McAusland v. Pundt, 1 Neb. 211, 244).

As stated in Langley v. Warner, 3 N. Y. 327, 330:

"No one was bound to presume that the judgment of a court of competent jurisdiction was erroneous, and would be reversed. The legal presumption was the other way—that the judgment was right and would be affirmed."

In a restitution suit, therefore, the presumption that the decree of the lower court is correct rebuts any presumption that a litigant acquiring property under such decree has dealt with the property as a trust fund, or, in other words, has proceeded upon the theory that the decree would be reversed

The reasoning seems equally applicable to reparation. Surely, the carrier is not presumed to have proceeded upon the theory that charges collected under a valid tariff were not being lawfully collected and must be preserved at the bottom of the deposit for the account of the rightful owner.

When the charges are collected, the carrier may believe in good faith that they are reasonable. If the tariff is duly filed and is not suspended by the Commission, all concerned are not only permitted, but obliged, to proceed upon the theory that the rates in such tariff have the binding effect of statutory enactments. To charge a carrier with the presumption that it has conducted its business on the theory that the charges collected under a valid tariff were unlawful charges is equivalent to indulging the same presumption with respect to acts performed under statutory authority. The statute may be declared unconstitutional and the tariff rate may be declared unreasonable and reparation awarded, but pending this action no one is presumed to have conducted his business upon the theory that what the law declared lawful was actually unlawful.

Discussing the presumption under consideration, it has been uniformly conceded that "this is a mere presumption, which will not stand against evidence to the contrary" (Brennan v. Tillenghast, 201 Fed. 609, 614; Board of Com'rs v. Strawn, 157 Fed. 49, 51). Nor will it stand in the face of a contrary presumption (Yarnell v. Ry. Co., 113 Mo. 570, 579).

We, therefore, respectfully insist that the presumption often invoked in the tracing of trust funds, to the effect that the wrongdoer has withdrawn his own funds from the deposit and permitted the trust fund to remain at the bottom of the checking account, will not prevail in a case of this kind where the presumption, at the time, is that the funds have been lawfully collected and are, therefore, the absolute property of the party receiving them.

## Concerning the Other Issues in This Case.

We are primarily interested in the fundamental principles which distinguish the trust-fund theory from restitution and reparation. It is not our desire to meddle with issues which alone affect the principal parties to this litigation, and yet upon reading and rereading the opinion of the Circuit Court of Appeals in this case, we are convinced that in its discussion of every issue involved, such radical views have been taken that the opinion, if permitted to stand in any respect, establishes a dangerous precedent, and tends to befog rather than to clearify the issues discussed. A few illustrations will suffice:

Interest on trust funds can only be allowed as damages, and the principles of a constructive trust could not possibly be applied to damages, and yet the Court, in failing to distinguish between the alleged trust fund proper and the interest allowed as damages for its retention, has treated the entire judgment as a trust fund (Tr., p. 768).

Of course, since the interest itself does not constitute a trust fund, the Court has erred in allowing interest subsequent to the date of the receivership proceedings (Thomas v. Car Co., 149 U. S. 95, 116).

The opinion imposes liability upon the purchaser by reason of that part of the final decree which requires such purchaser to assume those claims which are adjudicated prior in lien or superior in equity to the mortgage (Tr., p. 760). But the Court overlooks the fact that if these funds passed into the mortgaged property, as it so assumes, then the bondholders have a prior right by reason of their being innocent purchasers for value. They occupy the position of such innocent purchasers for value, not only under well-established principles of law, but by the specific finding of the final decree itself (Tr., pp. 595 and 598).

If it were necessary for Spillers to have reduced his claim to final judgment before filing it with the Special Master, then what the Court has to say respecting laches and estoppel might be well taken. Those who deal with a receivership proceeding should do so with knowledge that orders are usually made prescribing shorter periods of limitation than are allowed in other cases. They are charged with the knowledge that general creditors' bills contemplate the filing of all claims, both liquidated and unliquidated, with the Special Master on or before a time to be fixed by the Court. If we are correct in understanding that these claimants refused to anticipate or heed such an order, and after the purchaser had acquired the property in reliance upon the limitations and orders which barred claims that had not been timely and properly asserted, then for the first time attempted to come in under the final decree and assert claims superior in equity to the mortgage that was foreclosed, surely they are barred

by estoppel and laches, the opinion of the Circuit Court of Appeals to the contrary notwithstanding.

The Court's strained construction of the term "arise," as used in the Final Decree (Tr., pp. 756-9), does not seem at all in keeping with the apparent intention of the decree, and is apparently resorted to, as admitted in next to the last paragraph of the opinion, for the avowed purpose of attempting to find a means of disposing of the case on what the Court considered broad principles of justice.

The Love case, on which the opinion leans so strongly (Tr., pp. 762 and 764), has no application to such a situation as is here presented. In the Love case, title to the excess charges was not vested in the carriers, but the carriers, by virtue of a supersedeas bond, were permitted, for the time being, to collect the overcharges. Before the charges were collected, it had been adjudicated that the money belonged to the shippers, and the carrier merely collected it under the protection of a supersedeas bond, and not with any lawful claim to title. Furthermore, as respects the tracing of the funds, the claims in the Love case accrued within six months of the date of the receivership, and hence, specific tracing of the funds was unnecessary.

Nearly every principle of law announced in the opinion under review is questionable, loosely stated, and tends to disturb principles of equity that have heretofore been fairly well established. As opposed to this, the opinion of Judge Sanborn in this case is exhaustive, well considered and logical.

We respectfully urge that Judge Sanborn's views in toto be sustained, and that the opinion of the Circuit Court of Appeals be overruled.

Respectfully submitted,

MISSOURI PACIFIC RAILROAD COMPANY,
By EDWARD J. WHITE,
THOMAS T. RAILEY,
Counsel for Amicus Curiae.



# FILE COPY

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APR 11 1927

IN THE

WM. R. STANSBURY O FRK

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

ST. LOUIS-SAN FRANCISCO RAIL-ROAD COMPANY and THE ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY.

Petitioners,

VS.

E. B. SPILLER et al.,

Respondents.

No. 577.

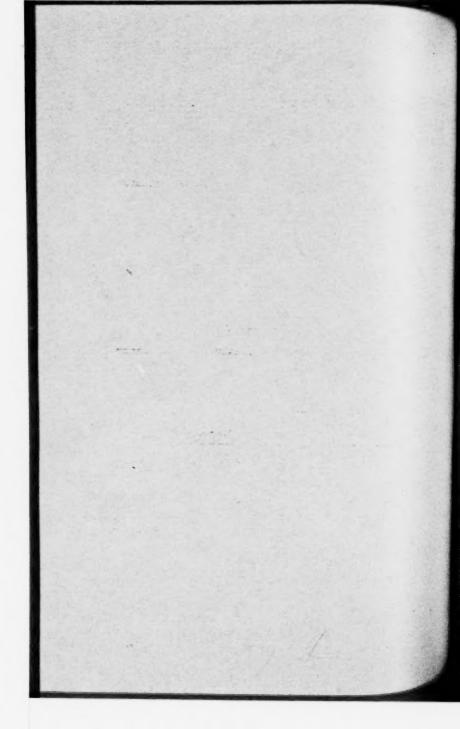
On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

## BRIEF OF STATE OF MISSOURI, AMICUS CURIAE.

NORTH T. GENTRY. Attorney-General of Missouri.

LEE B. EWING. Special Counsel for State of Missouri.

Jefferson City, Missouri.



#### IN THE

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

ST. LOUIS-SAN FRANCISCO RAIL-ROAD COMPANY and THE ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Petitioners,

No. 577.

vs.

E. B. SPILLER et al.,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

# MOTION OF STATE OF MISSOURI FOR LEAVE TO FILE PRIEF AS AMICUS CURIAE.

Now comes the State of Missouri and respectfully presents to the Court that, in its corporate capacity, it was one of the shippers and passengers from whom excessive freight and passenger charges were exacted by the Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railroad Company (since reorganized into the Missouri Pacific Railroad Company) pending the Rate Contesting Cases instituted in the Circuit

Court of the Western District of Missouri to contest the validity of the Maximum Freight Rate Laws of 1905 and the Maximum Passenger and Freight Laws of 1907 of the State of Missouri.

That the claim of the State of Missouri to recover back excess charges in violation of said freight statute are now pending by way of intervention in the Missouri Pacific and Iron Mountain receiverships in the United States District Court of the Eastern Division of the Eastern District of Missouri.

That said claims amount to many thousands of dollars and that for these reasons the State of Missouri is interested in the decision of the instant case.

#### II.

That said state is further interested to know whether or not there is a public duty on the part of railways incorporated under the laws of the State of Missouri, and which derive their existence from said state, to pay back to the shippers and passengers of said state overcharges on freight and passenger traffic exacted in violation of a valid statute of the state, while the hands of the shippers and passengers were tied by an erroneous and wrongful injunction issued from a Federal Court.

#### III.

That this Honorable Court has heretofore granted the privilege to the Missouri Pacific Railroad Company (the reorganized Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railroad Company) to file a brief as amicus curiae herein.

#### IV.

That respondents herein have consented to the State of Missouri filing a brief as amicus curiae, but that petitioner has declined to consent to same.

Wherefore, the State of Missouri asks that an order be entered permitting it to file the brief hereto attached as amicus curiae.

NORTH T. GENTRY,
Attorney General,
LEE B. EWING,
Special Counsel,
For State of Missouri.

#### NOTICE OF MOTION.

The petitioner and respondent in this case are notified that the State of Missouri will, on the 11th day of April, 1927, on the convening of the Supreme Court of the United States on that date, or as soon thereafter as hearing may be had, submit the foregoing motion for the consideration of the Court.

North T. Gentry,
Attorney General,

Lee B. Ewing,
Special Counsel,
For State of Missouri.

Service of the foregoing notice, motion and brief is hereby acknowledged, and respondent consents that the brief may be filed.

Attorneys for Respondent.

Attorneys for Petitioner.

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#### IN THE

# SUPREME COURT OF THE UNITED STATES.

#### OCTOBER TERM, 1926.

ST. LOUIS-SAN FRANCISCO RAIL-ROAD COMPANY and THE ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,

Petitioners. No. 577.

VS.

E. B. SPILLER et al.,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

## BRIEF OF STATE OF MISSOURI, AMICUS CURIAE.

#### STATEMENT.

The instant case is a suit for recovery of unjust and unreasonable interstate rates by respondents from petitioners, on account of shipments of live stock.

In 1903 the petitioner published the rates complained of. In 1905 the rates were attacked before the Interstate Commerce Commission and by it held to be unjust and unreasonable and petitioner was ordered to cease and desist from charging such unjust and unreasonable rates. After the enactment of the Hepburn Act in 1906 the Interstate Commerce Commission was given power to prescribe rates. In 1906, and after the enactment of the Hepburn law, the Commission again had the rates in question under consideration, and held same to be unjust and unreasonable, and made an order prescribing rates for the future to take effect November 17, 1908. The question of reparation from August 29, 1906, was reserved by the Commission to be subsequently decided. The overcharges here were exacted between August 29, 1906, and November 17, 1908. Subsequently respondent presented its claim to the Interstate Commerce Commission and an award of reparation was obtained. Upon this award a judgment was obtained against petitioner, St. Louis & San Francisco Railroad Company, and suit was brought upon said judgment against the receivers of the St. Louis & San Francisco Railroad Company and the reorganized company, the St. Louis-San Francisco Railway Company. The Circuit Court of Appeals of the Eighth Circuit entered a decree in favor of respondents, and held that respondents were entitled to a preferential payment of their claims.

The State of Missouri is interested in this question for the reason that in 1905 and 1907 it enacted what was known as the "Maximum Freight Rate and Maximum

Freight Rate and Passenger Statute," applicable to intrastate commerce in said state. These statutes were attacked by the various railroads in the state, and among others the Missouri Pacific Railway Company, the St. Louis, Iron Mountain & Southern Railroad Company and the Missouri, Kansas & Texas Railway Company. Claims for overcharges against said railroads by the state, in its corporate capacity, amounting to many thousands of dollars are now pending against the railroads just mentioned, and in each of these cases, the state contends that the overcharges were exacted in violation of a valid statute, without the consent of the shipper and under practical duress, and that neither the railway companies, nor the receivers, nor the reorganized companies obtained any title to said overcharges, and that same constitute a trust fund in the hands of said railroad, receivers and reorganized company.

The state further contends that there is a public duty resting on these carriers, who were created by the state, to restore to the shippers and passengers of the state the said overcharges exacted in violation of law, and against the will of the shippers and that this is a duty that the courts should be careful to enforce.

The claims of the state and the shippers and passengers of Missouri against these railroads are entitled to a preferential payment, because the overcharges illegally exacted, as above set forth, went into the treasury of the old railroad companies and into the hands of the receivers, and were commingled with other funds and passed to the hands of the reorganized companies, and that out of such funds the railway companies, and the receivers, paid current taxes, paid for improvements and betterments to roadbed and for additional equipment, paid interest on bonded indebtedness and for supplies and operating expenses.

#### BRIEF AND ARGUMENT.

#### A.

## Overcharges in question were unlawfully collected.

In the instant case, the action of the Interstate Commerce Commission in 1905 and again in 1908, holding the rates charged respondents to be unjust and unreasonable, were final; and conclusively branded said rates as unlawful. The decision in 1905 was rendered before the overcharges were exacted of respondent. Section 1 of the Interstate Commerce Act provides as follows:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property, as aforesaid, or in connection therewith, or for the receiving, delivering and handling of such property shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

The Interstate Commerce Act clearly and specifically brands all unreasonable and unjust rates as unlawful; therefore the exaction of the rates in question from respondent was an unlawful exaction and in violation of the express letter of the statute. The unlawful character of these rates had been conclusively determined before same were exacted. Said overcharges having been exacted in violation of an express statute, and against the will of

the shipper, and under practical duress, became a trust fund under a resulting trust, in the hands of the railroad company and the receiver.

B.

1.

Courts may hold a legislative act unconstitutional, but it is beyond the power of any court to suspend or amend a valid law, or change the effect thereof.

The foregoing proposition is so well embedded in our law that it seems a waste of time to call attention to it. However it seems to us that the recognition of this principle lies at the very bottom of the question now before this Court.

In the case of White v. Delano, 270 Mo., l. c. 34, Woodson, J., speaking for the Court, said:

"I know of but two ways to suspend or repeal a statute duly enacted, and the first is by an act of the Legislature expressed or implied in the same or in a subsequently enacted statute, and second, by the courts of the state, in declaring a statute invalid in the exercise of their judicial authority. \* \* \* We, therefore, hold that the act under consideration was not suspended during the pendency of the injunction mentioned."

To hold that a valid statute is suspended and made inoperative by an erroneous decree of a court afterwards reversed, is to hold that courts have legislative powers. Jus dare belongs to the legislature; jus dicere to the courts. If a statute is valid, then it is beyond the power of a court to suspend same.

In **Ogden v. Blackledge**, 2 Cranch 272, the United States Supreme Court said that courts may declare what the law is, but legislatures have the right to make laws and declare what they shall be. To hold that the injunction erroneously granted by Judge McPherson suspended a valid statute, would be to overturn the principles that lie at the very base of our system of government. To so hold would be to say that an erroneous injunction changed the Maximum Rate statutes of Missouri during the years from 1905 to 1914.

In the case of **Moor v. Damon**, 4 Mo. App., l. c. 115, Judge Hayden, speaking for a unanimous court, said:

"The judgment when reversed and the law declared, that law is to be considered as having existed from the first. To hold the contrary would be directly at war with the theory on which our system of law is based, and would be to declare that it is a province of the courts jus dare non jus dicere."

In the case of **Pierce v. Pierce**, 46 Ind. 95, the Supreme Court of Indiana said:

"This court has no power to repeal or abolish a statute."

Under our system, government is divided into three distinct branches—the legislative, the executive and the judicial. It is the sole province of the legislative branch to make the law. When that branch declares the law. there is no power resting in either one of the other branches to overturn, change or suspend that law, so long as the enactment conforms to the Constitution. The court may determine whether or not a given statute is within the powers limited to the legislature by the Constitution. And of necessity that question rests always for final determination in the courts of last resort. Whoever assails the constitutionality of a statute must know this fact. The enactment of constitutional statutes stands always the same. An erroneous and wrongful decision of the lower court cannot change the effect of a valid statute.

We plant this case squarely on the foundation that the Missouri Rate Statutes were valid and effective at all times, and that the erroneous injunctive decree, which was issued by Judge McPherson, in no way made lawful what the statute had declared unlawful. On this foundation we confidently stand in this court.

2.

### A judgment reversed is as though it had never been.

The principle is firmly established in the courts of this country that, as between the parties, a judgment reversed

leaves the parties in the same position as though the judgment had never been rendered.

In the case of **Crispen v. Hannovan**, 86 Mo., l. c. 167-168, in speaking of the effect of a reversed judgment, the Missouri Supreme Court said:

"The judgment, which was reversed on defendants' appeal, was an entirety, and the only effect on such reversal was to 'restore the parties to the same condition in which they were prior to the rendition of the judgment. The judgment reversed becomes mere waste paper, and the parties to it are allowed to proceed in the court below to obtain a final determination of their rights in the same manner and to the same extent as if the cause had never been heard of or decided by any court. Neither, in the subsequent prosecution of the cause, can suffer detriment nor receive assistance from the former adjudication' (Freeman on Judgments, sec. 48)."

In the case of **Campbell v. Cauffman**, 127 Mo. App., l. c. 292, the Court said:

"The flat, unqualified reversal by the Supreme Court of Florida, of the judgment of the Chancery Court of Duval County, requiring Campbell, as assignee to pay the \$1,451.74 to respondent (herein) completely nullified the judgment and order, and its effect was to leave the case as though no judgment had ever been rendered or order made" (Moore v. Damon, 4 Mo. App. 111; 3 Cyc. 460).

In 3 Cyc. 460 it is said:

"The effect of a general and unqualified setting aside of a judgment, order, or decree is to annul it completely, and to leave the case standing as if such judgment, order or decree had never been rendered; and the judgment debtor is entitled to be restored to the property or rights that he has lost by reason thereof."

#### 4 C. J. 1204 lays down the rule as follows:

"The effect of a general and unqualified reversal of a judgment, order or decree is to annul it completely, and leave the case standing as if such judgment, order or decree had never been rendered."

In the case of **Ure v. Ure**, 223 Ill. 454, 114 Am. St. R., l. c. 342, the Court said:

"The effect of reversing the decree of January 4, 1892, was to abrogate it, and the cause stood in the Circuit Court precisely as it did before the entry of the decree. The decree was, in effect, expunged from the record and the parties to the litigation were restored to their original rights (McJilton v. Love, 13 III. 486, 54 Am. Dec. 449; Chickering v. Failes, 29 III. 294; Cable v. Ellis, 120 III. 136, 11 N. E. 188; Aurora etc. Ry. Co. v. Harvey, 178 III 477, 53 N. E. 331; Freeman on Judgments, sec. 481). A party to a suit is presumed to know of all the errors in the record, and such party cannot acquire any rights or interests based on such erroneous decree that will not be abrogated by a subsequent reversal thereof."

In the case of **Bellamy v. Ry.**, 227 Fed. 878, the Court said:

"Parties from whom excessive rates had been exacted were not confined to suing on the bonds. They also had the right given them by law to recover the overcharges. That right was not destroyed by the injunction, but was simply suspended. As soon as the injunction was out of the way the right and remedy for its enforcement stood the same as if the injunction had never been issued."

In the case of **White v. Delano**, 270 Mo., l. c. 34, the Court, in considering the very injunction involved here, said:

"But that ruling was overruled by the Supreme Court of the United States when the case reached there on a writ of error, thereby abrogating the judgment of the lower court ab initio."

In the case of **Haebler v. Myers**, 132 N. Y. 363, the Court said:

"While the erroneous order was a protection to the Sheriff who acted upon it while it was in force, it is no protection to the defendants, because it was subsequently reversed on appeal and became, as to them, the same as if it had never been made."

In the case of Railroad v. McKnight, 244 U. S. 368, in speaking of the effect of such reversed injunctive decree,

and the rights of Gallop, who had been restrained by the decree, the United States Supreme Court said:

"He sues on causes of action to recover overcharges arising under the Arkansas statutes. His right to sue, suspended by the injunctions improvidently granted, revived as soon as the permanent injunction was dissolved by the decree dismissing the bill."

3.

When a decision, holding a statute unconstitutional is reversed or overruled, the statute will be treated as valid from the beginning.

That a valid statute is never affected by an erroneous decision, holding it unconstitutional, seems a self-evident truth. How can a valid law be invalid at any time? In the case of White v. Delano, 270 Mo., l. c. 34, the Supreme Court of Missouri, in speaking of the effect of the injunction involved, said:

"But that ruling was overruled by the Supreme Court of the United States when the case reached there on a writ of error, thereby abrogating the judgment of the lower court ab initio. We, therefore, hold that the act under consideration was not suppended during the pendency of the injunction mentioned."

In the case of Solum v. R. R. Company, 133 Minn. 93, 157 N. W. 996, the Supreme Court of Minnesota, in pass-

ing on the effect of an erroneous injunction restraining the enforcement of a statute fixing railroad rates, said:

"As the state statute was a valid exercise of the legislative power, it necessarily follows that the rates prescribed therein have been the lawful rates from the time that the statute declared they should go into effect. The fact that defendant was legally, but erroneously, restrained, for a time, from putting such rate into effect, did not operate to make the rate unlawful or invalid during such period nor entitle the defendant to retain the excess above the lawful rate which it had collected by virtue of the erroneous injunction."

In the case of **Bellamy v. R. R.**, 220 Fed. 878, the Circuit Court of Appeals of the Eighth Circuit, in discussing the effect of an injunction restraining the enforcement of statutes fixing railway rates, and the rights of the shippers from whom overcharges were exacted, said:

"They also had the right given them by law to recover the overcharges. That right was not destroyed by the injunction, but was simply suspended. As soon as the injunction was out of the way the right and remedy for its enforcement stood the same as if the injunction had never been issued."

In the case of McKnight v. R. R., 244 U. S., l. c. 374, in discussing the effect of the dissolution of an injunction restraining state officers from enforcing a statutory rate,

and the right of a shipper from whom overcharges had been exacted, the Court said:

"His right to sue, suspended by the injunctions improvidently granted, revived as soon as the permanent injunction was dissolved by the decree dismissing the bill."

Corpus Juris, Vol. 12, p. 801, lays down the rule as follows:

"If the decision that statute is unconstitutional is subsequently reversed or overruled, the statute will be treated as valid and effective from the date of its enactment."

In the case of **Moore v. Damon**, 4 Mo. App., l. c. 115, the Court, in speaking of the effect of a reversal of a judgment, said:

"The judgment when reversed and the law declared, that law is to be considered as having existed from the first. To hold the contrary would be directly at war with the theory on which our system of law is based, and would be to declare that it is the province of the courts jus dare non jus dicere."

In the case of **Pierce v. Pierce**, 46 Ind. 95, the court had under consideration a state of facts, where a statute of that state had been held unconstitutional by the Supreme Court of Indiana. Subsequently the decision was overruled in a different case. In passing on the ques-

tion of the effect of overruling its former decision, the Indiana Supreme Court said:

"The point made by counsel is 'that when the decision in the case of Langdon v. Applegate, 5 Ind. 327, declared the unconstitutionality of the act of 1853, and acts of like form, the same stood abolished, and private rights obtained their status, and became vested as if such unconstitutional and void acts had never been passed'

"The consequence of overruling those cases was, that the statutes which, according to the rulings therein, would have been unconstitutional, were valid from the time of their enactment until they were repealed. It was not the overruling of those cases which gave validity to the statutes; but the cases having been overruled, the statutes must be regarded as having all the time been the law of the state. This Court has no power to repeal or abolish statutes. If it shall hold an act unconstitutional, while its decision remains, the act must be regarded as invalid. But if it shall afterward come to the conclusion that its former ruling was erroneous, and overrule it, the statute must be regarded for all purposes as having been constitutional and in force from the beginning. and the rights of persons must be determined accordingly."

McCullum v. McConaughy, 141 Ia. 172, the court had under consideration a state of facts where a statute of Iowa had been held unconstitutional by the Supreme Court of that state, because in violation of the interstate commerce clause of the United States Constitution. Sub-

sequently, in a different case involving the same statute, the United States Supreme Court held the statute constitutional. The McCullum case followed the United States Supreme court, and overruled the previous decision of the Supreme Court of Iowa. In passing on the effect of overruling its own previous holdings, the Supreme Court of Iowa said:

"The argument that our statutes become invalid by reason of our prior decision, and cannot now be enforced without re-enactment is entirely without weight. It is true that an unconstitutional statute, in so far as it is unconstitutional, is without force from the time of its enactment, but the decisions of the Court holding it to be unconstitutional may be overruled, and the supposed unconstitutionality may thus be found not to exist. \* \* \* That a statute which has been held unconstitutional, either in in toto or as applied to a particular class of cases, is valid and enforceable after the supposed constitutional objection has been removed, or in cases on which the objection is not applicable is well settled."

The authorities quoted conclusively show that when a judgment holding a statute unconstitutional is reversed, the erroneous and reversed judgment is treated as though it never had existed. The statute having been passed by legislative authority, and being within the Constitution and a valid exercise of legislative power, is held to be effective from the date of its enactment, or the time provided in the State Constitution for its taking effect. It

is in nowise suspended, amended or affected by reason of the erroneous judgment holding it unconstitutional. It must follow that when the erroneous judgment of Judge McPherson was overturned by the Supreme Court of the United States (Knot et al. v. M. K. & T. Rv., 230 U. S. 474, and 230 U. S. 352) it left the Missouri Maximum Rate Statutes valid and binding during all the period from 1905 to 1914, and until the same were amended by legislative authority. In the language of Justice Hayden, in the case of Moore v. Damon, supra, "To hold the contrary would be directly at war with the theory on which our system of law is based." The courts may interpret statutes, but they have no power to suspend them. In the language of Judge Woodson in the case of White v. Delano, "I know of but two ways to suspend or repeal a statute duly enacted. \* \* \* The first is by an act of the Legislature expressed or implied in the same or a subsequently enacted statute, and the second by courts \* \* \* in declaring a statute invalid in exercise of their judicial authority."

The holding, therefore, that the overcharges were "law-fully collected and the legal and equitable title thereto was at all times in the railway company" cannot be reconciled with the authorities quoted above. This conclusion is absolutely at war "with the theory on which our system of law is based." A valid statute is always valid. No judgment of a court can affect the operation of a valid statute. A different conclusion is tantamount

to a finding that an erroneous and wrongful injunction against a valid statute makes the statute invalid; that the wrongful injunction makes right what was wrong, and wrong what was theretofore right. This conclusion enables the defendant railway company, at whose instance the erroneous and wrongful decree was rendered, to obtain an advantage and title to property by doing the thing that a lawful statute denominates as unlawful and wrongful.

But for the wrongful injunction issued by Judge Mc-Pherson, the money of intervener (State of Missouri) would not now be in the hands of the defendant railway company. But for that injunction, the money which the state seeks to regain herein would be in its own hands. But for that injunction, the state would never have been deprived of its property; but for that injunction the money would not have been obtained from them and they would not now be here seeking redress.

Having failed in the suit to strike down the Rate Statutes, and having obtained the money of interveners by virtue of their own voluntary wrong by exacting charges in excess of statutory rates, that stand valid to this day, will a court of equity permit defendant railway company and its receiver to retain fruits of their own wrong? Will a court of equity permit them to assert that a wrongful injunction made right what was theretofore wrong? What could be more unconscionable? It was an act of a court of equity, in tying the hands of the state

officers and closing the doors of the state courts by its wrongful order that enabled defendants to unlawfully exact the overcharges in question. We can conceive of no higher duty resting on that same equity court than to undo its own wrong and restore to the interveners that which is their own. The same equity court should seek for the speediest and most simple way to bring about the righting of its own wrong. To paraphrase the language of the Court of Appeals in this Circuit, in the case of Love v. North American Company, "This is a duty not only to the shippers. It is a public duty owing to the state whose orders has been superseded. It is a duty which this Court and the Supreme Court have always been scrupulously careful to safeguard when superseding rates pending judicial inquiry as to their validity. It is a duty which a court of equity, that has taken over the business of a public carrier by means of a receivership, ought to be equally careful to enforce."

C.

1.

The collection of the overcharges in question was wrongful, in violation of a valid statute, against the will of the interveners, and under practical duress. It has been repeatedly adjudicated that the collection of the overcharges in question was wrongful and in violation of the law, and under practical duress.

In the case of the Arkadelphia Milling Co. v. Railroad,

249 U. S. 134, l. c. 147, in speaking on this question, the Court answering a contention of the railroad said:

"The contention that there was error in allowing interest on the amount of the overcharges is unsubstantial. The damage was complete when the overcharges were made, and as they were wrongfully made and without consent of the shippers, interest ran from that date on general principles."

In the case of **Railroad v. Lockwood**, 17 Wall. 379, the United States Supreme Court said:

"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to haggle or stand out and seek redress in the courts. He prefers, rather, to accept any bill of lading. \* \* \* In most cases he has no alternative but to do this or abandon his business."

In the case of **State ex rel. Barker v. Railroad**, 216 Fed. 564, in discussing the identical rate statutes here involved, **Judge Van Valkenburgh** said:

"The suits are not on the bond, nor from any damages accruing from the injunction as such. They seek merely to recover alleged overpayments of rates and charges made under practical duress, and in violation of the terms of what has now been adjudicated a valid statute regulation."

In the case of **Southern Pacific Co. v. Adjustment Co.,** 237 Fed., l. c. 962, in discussing the question of payment of rates to a railroad company, the Court said:

"It is well settled that money paid under compulsion may be recovered, even in the absence of protest at the time of payment. \* \* \* Payments made to a railroad company for freight charges, as these payments were made, are clearly payments under compulsion."

2.

Defendant railroad company and its receiver acquired no title to the overcharge exacted, and the same constituted a trust fund in their hands.

Special Master Seddon in his report in M. K. & T. overcharge cases, quoted from his own opinion on the motion of the State of Missouri to strike out parts of defendant's answer to its intervening petition. In his opinion on that motion, the Master said:

"The tying of the hands of the interveners by the injunction proceedings, so that it could make no effective resistance to the exaction of these excessive charges, did not directly and proximately cause the damage or loss to it (intervener). What did cause the damage was the voluntary act of the defendant in collecting the illegal charges under practical duress, and under cover of the protection of the injunction."

In the Master's opinion on said motion, he further said:

"The intervener is not a mere general creditor with the action for money had and received, but is the beneficiary under a constructive trust."

It is thus seen that the Special Master Seddon has heretofore held that the identical overcharges herein sued for, constituted a trust fund in the hands of defendants. In so holding, the Master followed the most eminent authorities, both text writers and courts, upon the question.

In **Story's Equity Juris** (13 Ed.) p. 604, Section 1255, the rule is thus laid down:

"One of the common cases in which a court of equity acts upon the ground of implied trusts in invitum is where a party has received money which he cannot conscientiously withhold from another party. It has been well remarked that the receipt of money which consistently with conscience cannot be retained is in equity sufficient to raise a trust in favor of the party for whom or on whose account it was received. And therefore whenever any interest arises, the true question is, not whether money has been received by a party of which he could not have compelled the payment, but whether he can now with a safe conscience, ex aequo et bono, retain it."

The Court of Appeals for this circuit in the case of Love v. North Amrican Company, 229 Fed., I. c. 106, in deaning

with the question of overcharges exacted when the state officers and shippers were restrained by injunction from enforcing statutory rates, said:

"The question now might be properly asked, to whom do the excessive charges received by the Frisco Company for transportation of freight belong? They certainly do not belong to the general creditors of the Frisco Company, nor to the bondholders, nor to the Frisco Company itself. The shippers not only paid the lawful charge, but they did more. They paid an excessive charge. That payment was an illegal exaction, and, as against the railroad company, and volunteers like the receivers, the moneys belonged to the shippers, after the payment the same as before.

"There is another aspect in which petitioners' equity appears equally strong. The railroad company got this money into its treasury by superseding rates that were fixed by authority of the state. When those rates were sustained, the carrier was bound to restore its excessive exactions. This was a duty not only to the shippers. It was a public duty owing to the state whose orders had been superseded. It is a duty which this Court and the Supreme Court have always been scrupulously careful to safeguard when superseding rates pending judicial inquiry as to their validity. It is a duty which a court of equity, that has taken over the business of a public carrier by means of a receivership, ought to be equally careful to enforce."

In the case of **White v. Delano**, 270 Mo., l. c. 38, the Supreme Court of Missouri, in passing on overcharges exacted under the very statutes, and under the very same conditions as in the instant cases, quoted and approved the language of the Love case. The Court then said:

"The rate statutes here under consideration are valid, as held by the Supreme Court of the United States, and therefore, the excessive charges collected from plaintiff were unlawfully collected. So the question naturally arises, as asked by said Circuit Court of Appeals, to whom do the excessive charges collected by the Wabash Company from the plaintiff for the transportation of his freight belong? They do not belong to the general creditors of the Wabash Company, nor to the bondholders, nor to the Wabash Company itself. Unquestionably they belong to the plaintiff in this case."

In the case of **Angle v. Chicago, St. P. & O. Ry. Com**pany, 151 U. S., l. c. 25, in discussing the rules in relation to constructive or resulting trust, Justice Brewer, in speaking for the Court, said:

\* \* "While no expressed trust is affirmed as to the lands, it is familiar doctrine that a party who acquired title to property wrongfully may be adjudged a trustee ex male ficio in regard to that property." Judge Brewer then quotes from Pomeroy Eq. Jur., as follows:

"In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities or through any other similar means which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same. The forms and varieties of these trusts, which are termed ex male ficio or ex delicto, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer."

In the Arkadelphia case, 249 U.S. 134, the Court said:

"The contention that there was error in allowing interest upon the amount of the overcharges is unsubstantial. The damage was complete when the overcharges were made, and as they were wrongfully made and without consent of the shippers, interest ran from that date on general principles."

D.

Judge Sanborn's decision quoted by Missouri Pacific Railroad is in direct conflict with controlling decisions of this Court.

The opinion of Judge Sanborn cited by the Missonri Pacific Railway Company in its brief, as amicus curiae, p. 11, is contrary to all the authorities hereinbefore cited and reviewed. As heretofore pointed out, the valid and constitutional statute is not affected in anywise by an erroneous decree holding it unconstitutional. We apprehend that no authority can be found sustaining Judge Sanborn's opinion in this particular. To give to the erroneous injunction in the Missouri Rate cases the construction which Judge Sanborn gave it, is to violate the very basic principles of our Government. The Legislature had enacted a valid statute fixing intrastate freight and passenger rates for the State of Missouri, 230 U.S. 474; 230 U. S. 352. The Legislature having acted within its sovereign power under the Constitution, upon this question, and enacted a valid law, the effect of that law was not in anywise abrogated or changed by the erroneous judgment holding the law unconstitutional.

E.

## Cases cited by petitioner distinguished.

The cases cited by petitioner in its brief (pp. 23-26), do not sustain its contention. The case of the Texas Pacific

Rv. Co. v. Abilene Cotton Oil Company, 204 U. S. 426, the case of Pennsylvania Ry. Co. v. International Coal Mining Co., 230 U. S. 184, and the case of Robinson v. Baltimore & Ohio Railroad Co., 222 U. S. 506, were cases involving discrimination under the sixth section of the Interstate Commerce Act. These cases in nowise decide that an unjust and unreasonable rate is a lawful rate, merely because it is published by the carrier. They do decide that when the carrier has published a rate he may not depart from it in favor of one shipper, as against another. These cases apply solely to the question of uniformity of rates. The question as to whether or not a carrier who exacts unjust and unreasonable rates, in violation of Section 1 of the Interstate Commerce Act, obtains legal title to said overcharges, was not before the court in any of these cases, and was not in anywise held in judgment or passed upon therein. On the contrary, in the Abilene Cotton Oil case, 204 U.S. 426, the Court expressly says that the act made it the duty of carriers, subject to its provisions, to charge only just and reasonable rates.

When a carrier publishes a rate which is unjust and unreasonable, it has the power to immediately change said rate, whenever it sees fit, by publishing a rate that is just and reasonable. The sixth section of the Interstate Commerce Act cannot be construed so as to make lawful what the first section of the act expressly declares to be unlawful. The sixth section is aimed at the question of uni-

formity and is intended to prevent discrimination and favoritism on the part of the carrier; and when so construed, it is in absolute harmony with the first section of the act and does not in anywise conflict therewith. The opinion of Judge Sanborn construing the Interstate Commerce Act, quoted on page 25 of petitioner's brief, is absolutely out of harmony with the purpose of the act and creates a conflict between sections one and six, which does not exist. Judge Sanborn entirely overlooks the fact that section 6 was intended wholly and solely to guard against discrimination and to provide uniformity in the rates charged by the carrier.

The fact that the carrier cannot depart from the rate that it has published, so long as it retains it as its published rate, cannot, by any fair construction of the act, be deemed to make lawful that which the first section of the act says shall be unlawful. If a rate is unjust and unreasonable, it is not lawful, notwithstanding that the railway company must make a uniform charge of the published rate until it changes same. The Abilene case clearly sustains this view of the act.

The opinion of Judge Sanborn, if carried to its logical conclusion, would result in the very discrimination which the Interstate Commerce Act by section 6 prohibits; for the reason that a solvent railroad would be compelled to pay back the excess over a just and reasonable rate, while a railroad that becomes insolvent and goes into

the hands of a receiver would be permitted to retain the overcharges.

F.

Where a railroad company gets money into its treasury in violation of valid laws fixed by the state which created it, there is a public duty owing to the state, to restore the unlawful exactions.

The Court of Appeals for the Eighth Circuit in the case of Love v. North American Company, 229 Fed., l. c. 106, in dealing with the question of overcharges exacted when the state officers and shippers were restrained from enforcing statutory rates, said:

"The question now might be properly asked, to whom do the excessive charges received by the Frisco Company for transportation of freight belong? They certainly do not belong to the general creditors of the Frisco Company, nor to the bondholders, nor to the Frisco Company itself. The shippers not only paid the lawful charge, but they did more. They paid an excessive charge. That payment was an illegal exaction, and, as against the railroad company, and volunteers like the receivers, the money belonged to the shippers, after the payment the same as before.

"There is another aspect in which petitioners' equity appears equally strong. The railroad company got this money into its treasury by superseding rates that were fixed by authority of the state. When

those rates were sustained, the carrier was bound to restore its excessive exactions. This was a duty not only to the shippers. It was a public duty owing to the state whose orders had been superseded. It is a duty which this court and the Supreme Court have always been scrupulously careful to safeguard when superseding rates pending judicial inquiry as to their validity. It is a duty which a court of equity, that has taken over the business of a public carrier by means of a receivership, ought to be equally careful to enforce."

The foregoing opinion was quoted, with approval, and followed and applied by Judge Pollock in the case of United States & Mexican Trust Co. v. Kansas City M. & O. Ry. Co. et al., 240 Fed. 505. Likewise, the Love case was quoted with approval and followed in the case of White v. Delano, 270 Mo., l. c. 38.

There is no distinction between the Love case and the Missouri Overcharge cases. In the Love case, the Railroad and Warehouse Commission of Oklahoma fixed a certain rate under the Oklahoma law. The railroad had the right to appeal to the Supreme Court of Oklahoma from the decision of the Commission, by giving a supersedeas bond. This it did, and charged rates during the pendency of the appeal in excess of the Commission-made rate. The Love case held that the railroad obtained no title to this excess, as it was exacted in violation of a valid rate fixed by the Commission.

In the Missouri rate cases, the railroads obtained an injunction restraining the courts and officers of the State of Missouri from enforcing the statutory rates of that state, and during the pendency of the appeal taken by the state from the decision of the Circuit Judge, holding the application of the rates unconstitutional, the railroads collected rates in excess of the statutory rates, which statutory rates were held to be valid and binding by the United States Supreme Court (Knot v. M. K. & T. R. R., 230 U. S. 474; Simpson v. Sheppard, 230 U. S. 352).

There is, and can be, no distinction in principle between the two cases. The exactions in each case were made in violation of a valid law, while the validity of the law was being contested. In each case the legislative or commission-made rate was sustained.

In the case of Mercantile Trust Co. v. St. Louis-San Francisco Ry. Co., 69 Fed. 193, the Court said:

"A court of equity views with extreme disfavor the action of a railroad company which exacts exorbitant and illegal fares from the traveling public in violation of the laws of the state from which the company derives its right to operate its road, if not its existence. There would be small safety for the state or its citizens if these artificial creations could, with impunity, disregard the reasonable and just limitations placed upon their powers by their creator. A court of equity will not, under any circumstances, set the seal of its approval upon such violations of the public rights, but will exercise all its powers and its widest discretion, when the opportunity is afforded

it, to encourage every effort of the state or its citizens to put an end to such practices."

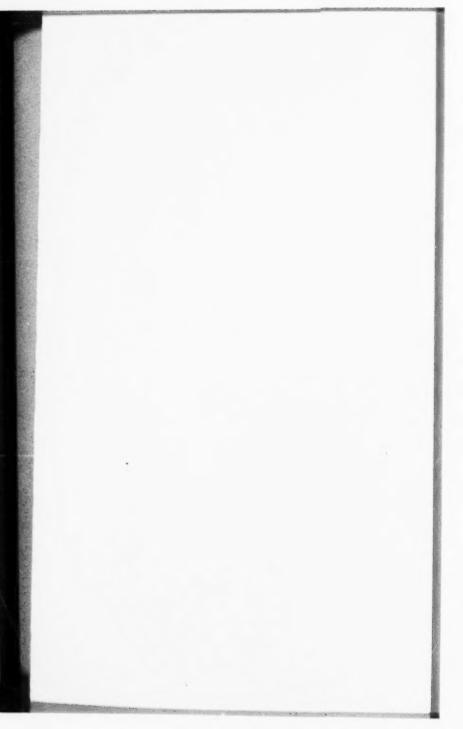
We believe that instead of lending aid to defeat the intervenors in their efforts to recover that money, this Court will be governed by the principle laid down in the case of Commonwealth ex rel. v. Scott, 112 Ky. 252. That is: "How to quickly, justly, inexpensively, restore to the citizen his own; \* \* and if either form or substance must be sacrificed, as justice is the end, and the procedure the means, the Court will regulate the latter to attain the former."

### CONCLUSION.

We submit that the opinion of the Court of Appeals of the Eighth Circuit in the instant case is in accord with the great weight of authority in this country, and that, so far as our search goes, the only opinions to the contrary are those written by Judge Sanborn. It has been held from the earliest times of common carriers that the collection of an unlawful rate was an illegal exaction, because of the dominating position of the carrier over the shipper, and the carrier did not become possessed of the equitable title to such money.

NORTH T. GENTRY,
Attorney General of Missouri,

LEE B. EWING,
Special Counsel for the State of
Missouri, Amicus Curiae.





# FILE COPY

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WM. B. STANSBURY

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

ST. LOUIS-SAN FRANCISCO RAILROAD COMPANY and the ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY.

Petitioners.

VS.

E. B. SPILLER et al.,

Respondents.

No. 577.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF AMICUS CURIAE, CLIFFORD B. ALLEN,

Boatmen's Bank Building, St. Louis, Missouri.



### IN THE

# SUPREME COURT OF THE UNITED STATES.

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VS.

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Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

# MOTION OF CLIFFORD B. ALLEN FOR LEAVE TO FILE BRIEFS AS AMICUS CURIAE.

I. Now comes Clifford B. Allen and respectfully represents to the Court that he is one of the solicitors of Missouri shippers, from whom excess charges were exacted by the Missouri Pacific-Iron Mountain Railroads pending their Equitable Rate Contesting Cases instituted in the

Circuit Court of the Western District of Missouri in 1905 against the shippers and officers of the state. The shippers have intervened as overcharge claimants in the Missouri Pacific and Iron Mountain receiverships and the claims are still there pending. He is interested in the decision in this case.

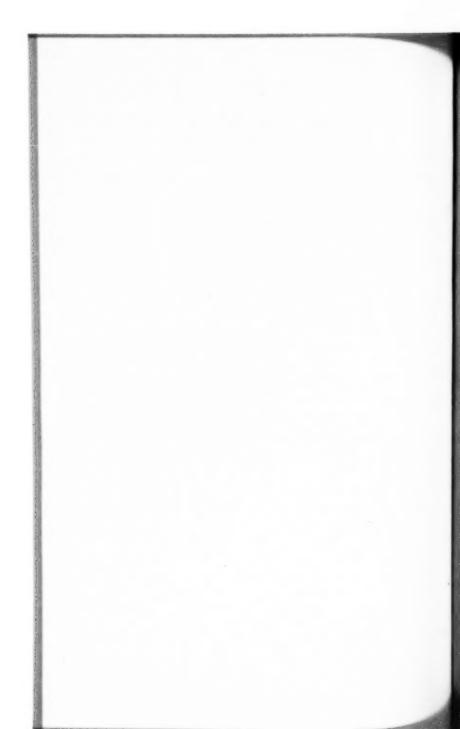
II. That this Honorable Court has heretofore granted the privilege to the Missouri Pacific Railroad Company, which is a reorganization of the St. Louis, Iron Mountain & Southern Railroad and the Missouri Pacific Railway Company, to participate herein and file briefs as amicus curiae.

consented to the undersigned filing a brief as amicus curiae therein, as has also the Missouri Pacific Railroad Company, amicus curiae, as appears from letters and consent signed below.

Wherefore, the undersigned prays that an order be entered permitting him to file the brief hereto attached, as amicus curiae.

## NOTICE OF MOTION.

The petitioners and respondent in this case are hereby
notified that the undersigned will, on the day of
1927, on the convening of the
Supreme Court of the United States on that date, or as
soon thereafter as hearing may be had, submit for the
hearing of said Court the foregoing motion.
******************
Service of the foregoing notice, motion and brief is
hereby acknowledged, and we consent that the brief may
be filed.
,
Attorneys for Respondent.
,
Attorneys for Petitioner.
Attorneys for Missouri Pacific



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### IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

ST. LOUIS-SAN FRANCISCO
RAILROAD COMPANY and the ST.
LOUIS-SAN FRANCISCO RAILWAY
COMPANY,

Petitioners,

No. 577.

VS.

E. B. SPILLER et al.,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

## BRIEF OF AMICUS CURIAE, CLIFFORD B. ALLEN,

I.

### PREFACE.

We quote from page 2 of brief of amicus curiae, Missouri Pacific Railroad Company:

"We are particularly concerned, because of the fact that over \$1,000,000 of overcharge claims alleged to have been collected UNDER THE PROTECTION OF AN INJUNCTION DECREE during the Missouri rate litigation and predicated upon the so-called trust fund theory are still pending before the Special Master in the Missouri Pacific-Iron Mountain Receivership cases, and the attorneys for these claimants are attempting to construe the decision in the Circuit Court of Appeals in this case as an authority, to the effect that charges in excess of the statutory rates, although collected UNDER AND PURSUANT TO A DECREE OF COURT OF COMPETENT JURISDICTION are trust funds, and that they need only to be traced into the general cash account as distinguished from checking accounts in particular banks of deposit." (Black caps ours.)

These attorneys there referred to have asked the privilege of filing this brief, because it seemed only fair to the shippers of the State of Missouri and to this Court that their view upon this situation should be before the Court, as well as that of the Missouri Pacific Railroad Company.

In 1905 the Legislature of the State of Missouri passed what was known as the "Maximum Freight Rate Act." Eighteen railroads in Missouri applied to the federal court at Kansas City (in cases of St. Louis-San Francisco and seventeen other roads v. Hadley, Attorney-General, 155 Fed. 220, 161 Fed. 419, 168 Fed. 317) to restrain the institution of suits by shippers and state officials based upon the failure of the carriers to comply with said statutes, alleging that the application of said statutes to each of them would be unconstitutional, because (a) it would

result in confiscation, and (b) in discrimination against interstate commerce. A restraining order, followed by a temporary and then a permanent injunction, without either attempting to fix the rates to be charged by the carriers, was entered.

In 1907 that Legislature passed a second Maximum Freight Rate Act, and by supplemental bill the railroads secured temporary injunctions as against shippers and officers of the state from bringing suits based upon their failure to comply with said act.

In 1909 the District Court at Kansas City entered a final decree finding that (a) the application of the rates to the carriers would not result in discrimination, and (b) that it would result in confiscation, and enjoined the officers of the state and the shippers from instituting suits based upon their failure to comply with said acts until further order of the Court.

Thereupon cross appeals were taken to this Court. This Court, in June, 1913, decided all these cases, holding in the case of thirteen of the major roads that the application of the Maximum Freight Rate Acts of 1905 and 1907 would not result in either confiscation or discrimination, and that in the case of five minor roads it would result in confiscation, and reversed, in part, the decree of the court below and ordered the injunction dissolved and the carriers' bill dismissed. These cases appear as the Missouri Rate Cases in 230 U. S. 474. Minnesota, Oregon, West Virginia, Arkansas Rate Cases were decided at the same time, 230 U. S. 352, 513, 525, 555.

The shippers of Missouri, overcharge claimants in the Missouri Pacific-Iron Mountain Receivership cases, contentended, first, that the overcharges exacted by those carriers during their Equitable Rate Contesting Injune. tion were not collected under and pursuant to a decree of a court, for no decree or order fixed the rates to be charged, but were collected and retained in violation of a statute which stamped the collection and retention of such overcharges as unlawful, and which this Court held was constitutionally applied to them; and second, that such overcharges exacted in violation of a valid law, were entitled to a preferential payment, because there was always on hand in the treasury of the company cash, largely in excess of the aggregate sum of the excessive exactions, because from current income there had been diverted large sums of money to pay for additions and betterments to roadway and equipment, etc.; and third, because of the public duty that the carriers owed to the State of Missouri to return to the shippers these illegal exactions (Love v. North American, 229 Fed. 103; Mercantile Trust Co. v. Frisco, 69 Fed. 1931).

The fallacy of the Missouri Pacific argument is the contention (a) that the erroneously and subsequently dissolved injunction obtained by it restraining shippers from instituting suit against it for its failure to comply with a valid state statute (until the further orders of the Court) made the collection of such overcharges lawful, which a valid statute declared unlawful; (b) that the carrier, by

publishing an unjust and unreasonable rate, prohibited by statute, can make such rate a lawful one for it to collect; (c) that the withholding of excessive charges which, in equity and good conscience, belong to the shipper, does not result in a trust in invitum; (d) that is, the trust fund must be traced into a specific checking account of the trustee.

These contentions have been presented to and rejected by the courts in the cases infra.

#### II.

# The Injunction Did Not Destroy Shippers' Cause of Action for Overcharges, Nor Make Them Lawful.

In the Arkansas Rate case, injunction bonds to a large amount had been required as a condition precedent to the injunction. After the reversal of that case and its remanding to the District Court to proceed in accordance with the opinion, a Master was appointed to hear claims for overcharges arising pending the injunction. Gallop, a shipper, instituted suit in the Chancery Court of Baxter County for an accounting and discovery of overcharges illegally exacted pending the injunction. The carrier applied to the Federal District Court in the Arkansas Rate case for an injunction restraining Gallop from so proceeding, and Judge Trieber issued the injunction (St. Louis I. M. and S. Railway Co. v. Bellamy, 211 Fed. 175). Gallop and the Public Service Commission of Ar-

kansas appealed from such decree to the United States Circuit Court of Appeals and that Court in (Bellamy v. Railway, 220 Fed. 878) decided:

"Parties from whom excessive rates have been exacted were not confined to suing on the bond. They also had the right, given them by law, to recover the overcharges. That right was not destroyed by the injunction, but was simply suspended. As soon as the injunction was out of the way, the right and remedy for its enforcement stood the same as if the injunction had never been issued."

The railroad appealed to this court, which affirmed the decision of the Court of Appeals in that case under title of Railroad v. McKnight, 244 U. S. 368, and said:

"But Gallop makes no claim under the bond. He sues on cause of action to recover overcharges arising under the Arkansas statute. His right to sue, suspended by the injunction, improvidently granted, revived as soon as the permanent injunction was dissolved by the decree dismissing the bill. Although the injunction enjoined all shippers and travelers and, therefore, him, from instituting suits on account of alleged overcharges, Gallop did not, in fact, become a party to the suit in the District Court; and he could not, after the mandate directed dismissal of the bill, be compelled to submit to that court the adjudication of his claim."

None of the Missouri shippers represented in this case was eo nomine parties to the Missouri Rate case.

In the Arkansas Rate case there was left to the shipper, who intervened therein, two remedies only. One for damages on the injunction bond for overcharges collected pending the temporary injunction, and the other by way of restitution for overcharges exacted pending the appeal.

This Court did not, in the Arkadelphia case, decide that the collection by the carrier of charges in excess of the Arkansas rate was a lawful or legal collection. On the contrary, it was held (249 U. S. 134) that

"the damages were complete when the overcharges were made, and as they were wrongfully made, and without the consent of the shipper, interest ran from that date on general principles."

The Missouri Supreme Court, in **State v. C. & A.**, 265 Mo. 682, held that claims for excess freight and passenger rates were collected in violation of a valid law. In Judge Bond's dissenting opinion in that case (page 706) appears the following, which was consistent with the majority opinion:

"What was the effect of the injunction in the federal court? Simply to prevent the enforcement against the defendant of the state statutes regulating its charges. It could not and did not go further. \* \* \* Pending the final word of that great tribunal, the defendant in this case took the chance of violating the Missouri statute and compelled this plaintiff to pay \$50,000 contrary to the terms of the Missouri statute. This was a violation of the law by defendant, who

did it with imputed knowledge that the ultimate decision of the constitutionality of the statute it was disobeying was the sole prerogative of the Supreme Court of the United States, and that in the event that court should sustain the statute a constitutional exercise of the lawmaking power of this state, every dollar which it had taken from the state while the question of its right to enact these laws was in issue, would be an illegal and wrongful appropriation of the property of the state."

In Love v. North American Co., 229 Fed. 103, the Circuit Court of Appeals of the Eighth Circuit, said:

"The shippers not only paid the lawful charge, but they did more. They paid an excessive charge. That payment was an illegal exaction and as against the railroad company and volunteers like the Receiver. the money belonged to the shippers after the payment, the same as before. It will be presumed that it was a part of the money in the treasury of the company which passed to the Receiver. The money came into the hands of a court of equity. What ought such court have done with it? Surely it could do nothing but direct that it be returned to the shippers to whom it belonged. It having been paid to the bondholders, or for permanent betterments of the property for their benefit, through the agency of a court of equity, that court, as a court of conscience, can do no less than direct its restoration.

"Second. There is another aspect in which petitioners' equity appears equally strong. The railroad company got this money into its treasury by superseding rates that were fixed by authority of a state. When those rates were sustained, the carrier was bound to restore the excessive exactions. This was a duty not only to the shipper, it was a public duty owing to the state, whose orders had been superseded. It is a duty which this Court, and the Supreme Court, have always been scrupulously careful to safeguard. When superseding rates pending judicial inquiry as to their validity. It is a duty which a court of equity that has taken over the business of a public carrier by means of receivership, ought to be equally careful to enforce."

In the Missouri Rate case the railroads were not enjoined from putting in force the statutory rates. They themselves enjoined the institution of suits for the enforcement of those rates. They did not, however, secure from the Court the authority to collect, pending the injunction, the excessive rates on freight which they collected.

That the State had power to and did establish such rates is now put beyond question, by the decisions of this Court. That the statutory rates so established have been the only lawful rates from the time the statutes, by their terms, went into effect is also clearly established by the decisions of this Court and the Supreme Court of Missouri (cases supra). The fact that the carrier erroneously enjoined the shippers from instituting suit against it for

failure to comply with the statutes during its Rate Contest, did not make the statutory rates unlawful, nor legalize the collection of the excess above the lawful rates, nor destroy the shippers' right to recover the alleged overcharges in any action or forum which they had before the injunction was issued.

In Newton v. Gas Co., 258 U. S. 165, this Court said:

"Rate making is no function of the courts, and should not be attempted, either directly or indirectly."

In N. Y. v. Gas Co., 269 Fed. 288, the Court said:

"At the outset, however, it is desirable to make clear that this Court is not a rate-making body. The basic question is the constitutionality of the statute prescribing the rate."

"It is elementary that courts cannot make rates.

\* \* " (Lighting Co. v. Nixon, 268 Fed. 149).

In entering the decree upon the mandate in the Missouri Rate case, in Railroad v. Barker, 210 Fed., l. c. 916, that Court said:

"Commencing 24 years ago, in the case of Milwaukee R. R. Co. v. Minnesota, 134 U. S. 418, 33 L. Ed. 970, and continuing to the present time, there has been a uniform line of holdings that the fixing of a rate is a legislative act \* \* \*."

The decree in the Missouri Rate case will demonstrate that no freight rates were fixed or authorized to be collected pending the injunction.

In addition, however, the dissolution of the injunction rendered enforceable another obligation assumed by the carrier when it procured the injunction, to do equity to the shipper by restoring the status quo, i. e., the right of the shipper to enforce restitution in the injunction suit. This was concurrent, consistent and cumulative to and with the rights of the shipper which existed before the injunction suit was brought, and which were restrained thereby. This right of restitution was the one enforced in the Arkadelphia case.

The Missouri Pacific Railroad Company in their argument overlooks entirely the fact that it was the prohibition of a valid statute, constitutionally applied to them, that stamped their collections and retention of overcharges, pending the injunction, as illegal. That the injunctions in the rate case simply enjoined the shippers from instituting suits based upon the carriers' failure to comply with a statute.

The railroads knew, as was said by the Supreme Court in **Thompson v. Kentucky**, 209 U. S. 346:

"That at any rate, it is the province of the courts to interpret the laws of the state, and he who acts under them must take his chances of being in accord with the final decision, and this is a hazard under every law and from which, or the consequences of which, we know of no security.''

An injunction of a nisi prius court is no security against the consequences of violating a state statute by it erroneously interpreted.

In Vol. XII, Corpus Juris, Title, Constitutional Law, p. 801, it is said:

"If the decision that a statute is unconstitutional is subsequently reversed or overruled, the statute will be treated as valid and effective from the date of its enactment."

Christopher v. Mungen, 61 Fla. 513, 534, 55 So. 273;

Pierce v. Pierce, 46 Ind. 86;

McCollum v. McConaughy, 141 Iowa 172, 119 N. W. 539.

In White v. Delano, Receiver of the Wabash Railroad, 270 Mo. 16, 34, 38, another one of the Missouri Rate Cases, the Supreme Court of Missouri said:

"We, therefore, hold that the act under consideration was not suspended during the pendency of the injunction mentioned. \* \* \*

"The rate statutes here under consideration are valid, as held by the Supreme Court of the United States, and, therefore, the excessive charges collected from the plaintiff were unlawfully collected. \* \* \* "

In the case of Solumn v. Northern Pac. Ry. Co., 133 Minn. 93, 157 N. W. 996, the same contention came before the Minnesota Supreme Court, and in passing upon the question the Court said:

"The injunction case went to the United States Supreme Court and that court held that the state statutes and the rates prescribed thereby were valid and dissolved the injunction. That the state had the power to and did establish such rates is now beyond question. As the state statute was a valid exercise of the legislative power, it necessarily follows that the rates prescribed therein have been the lawful rates from the time that the statute declared they should go into effect. \* \* \* The fact that defendant was legally, but erroneously, restrained, for a time, from putting such rate into effect, did not operate to make the rate unlawful or invalid during such period nor entitle the defendant to retain the excess above the lawful rate which it had collected by virtue of the erroneous injunction."

The overcharges were exacted in violation of a valid statute, and consequently must have been collected without any legal right or authority to receive them. The collection of an excessive rate is ipso facto unlawful under the Missouri statutes.

#### III.

The Collection and Withholding of Unlawful Freight Charges Results in Equity in a Trust In Invitum.

The Missouri Pacific Railroad contends that there is no difference in the rights and remedies of an intervener in the original rate case and of a shipper who had not intervened in that case. An intervener in the original rate case, who sought to recover overcharges as damages after the f al injunction, was exclusively confined to his remedy of restitution. But a shipper, who had not so intervened, had all the rights and remedies that existed (for the recovery of such overcharges) before and independent of the injunction (Fleming v. Reddick, 5 Grat. [Va.] 272; Little Rock v. Little Rock, 76 Ark. 48; Poultney v. Warren, 6 Ves. 73; Bellamy v. Rd., 220 Fed. 876; Rd. v. McKnight, 244 U. S. 369).

Such shipper had the right to go to any such forum and there predicate his recovery on the assumption that the collection and retention of such charges were entirely unlawful, and that he might do, whether his suit was for money had and received, or for the enforcement of a constructive trust, or for overcharges exacted in violation of the statute.

Judge Seddon, in the quotation appearing on page 10 of the brief of the Missouri Pacific Railroad, is in error in his conclusion, "it is not, as supposed by the learned counsel for the interveners, a case of a choice of two remedies for the same cause of action. The causes of action are distinctly antagonistic." The learned Special Master was led into this erroneous statement by his conclusion that the shippers were, eo nomine, parties to the Missouri Rate case, and they, therefore, lost their right to proceed to recover their overcharges in other forums

and in other causes of action. In that same report he said:

"Of course, all which the Master has said with reference to the legality of the act of the defendant in collecting the freight charges and in reference to restitution, is predicated upon the assumption of two facts. First, that the intervener and other shippers were parties to the Missouri Rate case. Second, that the defendant was authorized by the decree of injunction in that case to collect freight charges. If they were not parties to that case, or if the act of the defendant in collecting the charges was not so authorized, the intervener has an unobstructed action for relief from an illegal act," etc.

That the Missouri shippers, represented by this attorney, were not parties, eo nomine, to the Missouri Rate case and that the injunctive orders in that case did not fix any freight rate to be collected pending that injunction cannot be successfully disputed.

On page 11 of the Railroad's brief there is a quotation from Judge Sanborn's opinior affirming the Special Master's said conclusion. The same infirmity appears therein. Judge Sanborn decided that the final decree was binding, "so far as the parties to the suit were concerned." But the interveners there contesting were not eo nomine parties to the Missouri Rate case and could not be compelled to be parties thereto after the Supreme Court reversed the Missouri Rate case and ordered the injunction dis-

solved. (See McKnight case, supra.) Nor was there any order, or decree, in the Missouri Rate case authorizing the carrier, pending that injunction, to collect any fixed rate of freight, whatsoever.

Judge Sanborn fell into another error in failing to appreciate that it was not the dissolution of the injunction which rendered the overcharges collected during its pendency wrongful and unlawful, but it was the state statute which stamped their receipt and retention as illegal, which statute had been held by this Court as constitutionally applied to those roads.

It may be that the facts upon which the carrier bases his argument upon restitution and reparation "entitle the plaintiff to a judgment at law or an action for money had and received, but it is also true that the defendants, having obtained possession of property belonging to another, may be treated as a trustee and a court of equity be invoked to coerce the execution of the trust" (People v. Houhtaling, 7 Calif. 348).

### In Philips v. Hines, 33 Misc. 163, the Court said:

"The adoption by the courts of law of a remedy especially belonging to chancery jurisdiction, certainly cannot take away the jurisdiction from a court of chancery."

It is respectfully submitted that the shippers have a cause of action for these overcharges, and the same facts may justify the accounting by the carrier for such over-

charges by way of restitution, reparation or restoration, or any other appropriate remedy to recover from another that which, in equity and good conscience, belongs to the plaintiff.

We respectfully contend that the decisions of the Special Master in the M. K. & T. Receivership and of Judge Sanborn are in conflict with the controlling decisions of the Court of Appeals and the Supreme Court hereinabove referred to (Bellamy v. Rd., 220 Fed. 878; Love v. North American, 229 Fed. 133-6-7; Rd. v. McKnight, 244 U. S. 368; Arkadelphia v. Rd., 249 U. S. 134). And with the decisions of the State of Missouri (Barker v. Rd., 265 Mo. 646; White v. Delano, 270 Mo. 634-8).

### IV.

### The Remedy of Reparation Is Based Upon the Theory That the Collection of Overcharges Was Unlawful.

Section 1 of the Act to Regulate Commerce provides that, "all charges \* \* \* shall be reasonable and just and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." It is, therefore, the duty of the carrier to publish only lawful rates. If the carrier sees fit to publish an unlawful rate he takes a chance of being in accord with the final decision of the Interstate Commerce Commission, and "that is a hazard under every law, and from which, and the consequences of which, we know of no security" (Thomps-

son v. Kentucky, supra). The carrier publishes such a rate at his peril and the fact that the shipper is compelled to pay such unlawful rate by the dominating position of the carrier over the shipper does not mitigate the carrier's offense; it aggravates it. The fact that by so posting the carrier may be compelled to continually collect the unlawful charges and be guilty of a series of trespasses upon the rights of the shipper is the chance that it takes.

The Interstate Commerce Commission in Arkansas Fuel Co. v. R. R., 16 I. C. C. Reports, p. 97, said:

"While it may be, and indeed is, the legal rate, the rate that must be paid by the shipper and collected by the carrier, because it is the published rate, the mere publication cannot make a rate lawful that is unreasonable and excessive."

In the case of **Southern Pacific v. Darnell**, 245 U. S. 531, which was a reparation case, Justice Holmes, speaking for the Court (p. 534), said:

"The plaintiff suffered losses to the amount of the verdict when he paid. That claim accrued at once, in the theory of the law, and it does not inquire into later events. \* \* \* The carrier ought not to be allowed to retain his illegal profit. \* \* \*"

In **Mills v. Lehigh**, 238 U. S. 473, a reparation case, Justice Hughes (p. 481) said:

"What the Commission decided was that the shippers were entitled to reparation. That is, to be made whole. To be compensated for losses because of an illegal and unreasonable exaction."

In Philips v. Grand Trunk, 236 U. S. 662, Justice Lamar said:

"When the overcharge was collected, a cause of action at once arose, and the shipper at once had the right to file a complaint, or to intervene in proceedings instituted by others."

The Circuit Court of Appeals, in **Darnell v. Southern Pacific**, 221 Fed., l. c. 894, said:

"On the other hand, the charging of an excessive and unreasonable rate is ipso facto unlawful."

In L. & N. R. R. Co. v. Schloss-Sheffield Steel & Iron Co., 269 U. S. 222, 70 L. Ed. 245, in a reparation case under the Interstate Commerce Act, this Court, through Judge Brandeis, said:

"The wrong for which the statute renders the carrier liable is the exaction of payment pursuant to an unlawful rate, not the withholding of the excess unlawfully exacted. \* \* \* On the findings made we cannot say that the conclusion of the Commission that interest should be paid from the date of the illegal exaction was unwarranted."

In Baer Bros. Mercantile Co. v. Denver & R. G. R. Co., 233 U. S. 477, 58 L. Ed. 1055, this Court, speaking through Justice Lamar, said:

"This situation was dealt with by the Hepburn Act which, in addition to existing powers to make reparation, conferred upon the Commission the new power to make rates for the future. But the two matters were treated as different subjects and were dealt · with in separate sections. Section 4 conferred the power of making rates. Section 5 gave the Commismission power to make reparation orders. Not only were the two functions separately treated, but an analysis of the act shows that there is no such necessary connection between them as to make the quasi-judicial order for reparation depend for its validity upon being joined with the quasi-legislative order fixing rates. Persons entitled to one may have no interest in the other. Persons interested in both may be entitled to reparation and not to the new rate or to the new rate and not reparation. \* \* \* \* "

The order for reparation in the Spiller case was absolutely valid. The case cited by the railroads, C. B. & Q. R. R. Co. v. Merriam and Millard, 297 Fed. 1-3, has no application to the facts in the instant case because the claim was not on an order of the Commission.

The very theory of the reparation provisions of the Interstate Commerce Commission Act is that the overcharges were unlawfully collected, and a cause of action accrued at the time of their collection and the award of reparation is simply the ascertainment by the Commission of the amount of such unlawful exactions and the provision in the act that such award may be enforced by proceedings in the federal court elsewhere, or judgment thereon, bears, on its face, the stamp that such amount had been unlawfully exacted, and in case such judgment must be filed in a receivership reorganization proceeding, it should there be treated as a conclusive adjudication that the overcharges there evidenced were unlawfully exacted, and there that judgment would be entitled to a preferential payment.

The amicus curiae, the Missouri Pacific Railroad Company, attempts to make a distinction between "restitution," "reparation" and what it sees fit to call "the trust fund theory." In Bouvier's Law Dictionary, "reparation" is defined to be "the redress of an injury, amends for a tort inflicted." The same authority defines "restitution" as "the return of something to the owner of it, or to the person entitled to it."

Both these remedies are enforced in the proceeding in which the judgment or decree is entered. In neither proceeding, in the case of a rate statute, does the reversal of the decree or the award of the Commission make unlawful the rates actually collected, but in each case, the valid statute, state or federal, makes their collection ipso facto unlawful.

It seems to be conceded by the Missouri Pacific Railroad Company that restitution and reparation are both based upon the theory that the shipper is truly and equitably entitled to the overcharge, and the carrier cannot conscientiously withhold such excess charges from the person who is entitled to it. But, in addition to that, in such cases, a violation of the state statutes is a further fact that such statutes stamp the receipt and retention of such excessive charges as illegal.

Justice Story (Sec. 1255, 2 Story Equity Jurisprudence, 13th Ed. 604) says:

"One of the common cases in which a court of equity acts upon the grounds of implied trust in invitum is where a party has received money which he cannot conscientiously withhold from another party. It has been well remarked that the receiver of money which consistently with conscience cannot be retained is in equity sufficient to raise a trust in favor of the party for whom or on whose account it was received. This is the governing principle in all such cases. And therefore, whenever any interest arises, the true question is, not whether money has been received by a party of which he could not have compelled the payment, but whether he can now, with a safe conscience, ex aequo et bono, retain it."

In 39 Cyc 179 the rule is stated in the following language:

"One who acquires land or other property by fraud, misrepresentation, imposition, concealment, or under any other such circumstances as rendered it inequitable for him to retain it, is in equity regarded as the trustee of the party who suffers by reason of the fraud or other wrong, and who is equitably entitled to the property."

That the carrier is not in equity and good conscience entitled to retain the overcharges is the crux of his argument upon restitution and reparation and he demonstrates that in equity a trust in invitum may be therefore decreed.

# In Newton v. Porter, 69 N. Y. 133, the Court said:

"The law in such a case will raise a trust in invitum out of the transaction, for the very purpose of subjecting the substituted property to the purpose of indemnity and recompense. 'One of the most common cases,' remarked Judge Story, 'in which a court of equity acts upon the ground of an implied trust in invitum, is when a party receives money which he cannot conscientiously withhold from another party.'"

# In Angle v. C. S. P. M. Co., 151 U. S. 1, this Court said:

V.

### TRACING TRUST FUNDS.

Whether either the exaction of the overcharge or the retention from the shipper, or both, were unlawful, the result in equity would be a trust in invitum. The inequitable act created the trust. It is the existence of a trust, and not the manner of its creation which gives rise to the presumption of identity, and the rule of confusion does not prevent such following of chattels and money of chattels and money (Southern Oil Co. v. Elliot, 218 Fed. 569; Erie Rubber Co. v. Dial, 140 Fed. 169; Smith v. Tp. of Au Gres, Mich., 150 Fed. 257; Gorman v. Littlefield, 229 U. S. 19; Duel v. Holland, 241 U. S. 523.

The stock and bondholders of the Frisco Railroad, operating that "railroad unit," desired to reorganize that company in accordance with a plan of reorganization agreed to by them, without any participation on the part of the unsecured creditors. In accordance with said plan, the stock and bondholders of the old company instituted the equitable reorganization receivership. The very purpose of such plan of reorganization was to prevent a sale of said railroad unit (and a distribution of its proceeds among its creditors) and to preserve that "railroad unit" for the stock and bondholders of the old company (Tr., p. 312, et seq.).

If the "railroad unit" with and into which these overcharges were commingled and converted was to be retained for the stockholders and bondholders of the old company, through their reorganization, there would be no necessity for tracing the overcharges into any specific bank account or chattel, because no specific piece of property was going to be sold, and no distribution of the proceeds of any such property or bank account was to be distributed in this equitable reorganization receivership to the creditors and claimants of the old company. The unsecured creditors were to be paid by stock of the reorganized company and there was no occasion to marshall assets. This entire railroad unit, with bank account, franchises, etc., was to be preserved for the benefit of the mortgagor and mortgagee, the stockholders and bondholders of the old company.

In Guaranty Trust Co. v. Mo. Pac. Ry. Co., 238 Fed. 815, Judge Hook, administrative Judge in the Missouri Pacific Receivership, said:

"After all that can be said from the standpoint of theory and strict right, the fact remains that many railroad receiverships, and the one here is typical of them, are but instruments for consummating plans of reorganization, and courts have come to realize that such use of their jurisdiction and processes entail a correlative duty to those affected by the result. Generally, in such cases, the principal parties to the suit are adversary only in name, and the existence of a collateral agreement, or understanding, sought to be consummated is suggested by the face of the pleadings. The relation between the receivership which

ensues and the plan of reorganization agreed upon is close and intimate. So far as properly can be done, the judicial proceedings are conducted in harmony with the plan, and the success of the agreed readjustment is promoted by the orders of the Court and the acts of the Receivers."

The correlative duty which is recognized as due from the Court to the shippers and the creditors affected by such reorganization is further illuminated by the following decisions of this Court: Chicago Ry. Co. v. Howard, 7 74 U. S. 409, Louisville Trust Co. v. Rd., 174 U. S. 674; Northern Pacific v. Boyd, 228 U. S. 482; Kansas City & Southern Ry. Co. v. Guardian Trust Co., 240 U. S. 166.

In Louisville Trust Co. v. L. N. A. & C. Ry. Co., 174 U. S. 674, this Court said:

"Can it be that when in a court of law the right of an unsecured creditor is judicially determined and that judicial determination carries with it a right superior to that of the mortgagor, the mortgagor and the mortgagee can enter into an agreement by which, through the form of equitable proceeding, all the right of these unsecured creditors may be wiped out, and the interest of both mortgagor and mortgagee in the property preserved and continued? The question carries its own answer. Nothing of the kind can be tolerated. \* \* It involves an offer, a temptation to the mortgagor, the purchase price thereof to be paid, not by the mortgagee, but, in fact, by the unsecured creditor."

The equitable reorganization receivership was a mere form of proceedings conducted in accordance with the plan of reorganization. There was to be no actual sale thereunder, but the railroad unit was to be transferred to the reorganized stock and bondholders of the old company. The prearranged sale took place in the City of St. Louis on July 19, 1916 (Tr., p. 638).

Elmer and Phillips, the purchasing committee of the reorganization, bid in the property and duly assigned that bid to the St. Louis-San Francisco Railway Company, a corporation organized to operate same (Tr., pp. 640-47). Property embraced in collateral trust agreement of July 1, 1911, was sold as an entirety for \$10.00; property embraced in trust agreement of September 3, 1912, was sold as an entirety for \$10.00; securities pledged to secure the promissory note of the railroad company held by the North American Company, was sold as an entirety for \$600,000.00; all the remaining property of every kind and description of the railroad company was sold as an entirety for \$45,700,000.00, to be paid for in bonds of the old company, to be credited or canceled. Master's report to this effect was duly filed July 19, 1916 (Tr., pp. 640-647), and \$45,600,000.00 of stock of the new company was issued to stockholders of the old company without compensation, as held by the Court of Appeals in this case and the Master (Tr., p. 147).

Just how the bondholders of the old company can be said to be innocent purchasers of a railroad unit, without notice and knowledge of their agreement in the plan of reorganization with the stockholders, and just how they can be said to be purchasers for value, when this Court has said above it would not be the bondholders in a sale of that kind, but the unsecured creditors who paid the consideration, is incomprehensible (Mo. Pac. Argument, p. 19).

This railroad unit into which the overcharges went, and into additions and betterments thereto, and the payment of taxes thereon and interest on the bond secured thereby, after this form of equitable proceeding, is still owned by the stock and bondholders of the original and reorganized company, and is still burdened with the same equities to account therefor to the shippers, from whom overcharges were exacted, just the same as before the receivership.

The Receiver, the purchasers at the so-called sale and the reorganized company are mere volunteers, and the creditors who have liquidated their claims by accepting stock in the new company can in nowise be prejudiced by the payment under the Spiller decree as the Court of Appeals held.

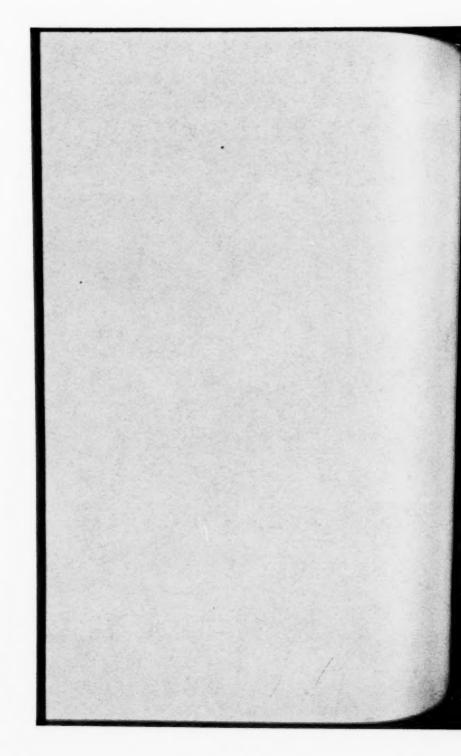
The brief of the Missouri Pacific Railroad Company concludes with a strong and, we submit, a wholly unjustifiable condemnation of Judge Kenyon's opinion. This opinion speaks for itself, and we venture to assert it will go down in the history of jurisprudence as one of the great opinions in cases involving the rights of shippers against

carriers which have extorted an unjust and unreasonable rate.

It is respectfully submitted that the decree of the Court of Appeals in this case should be affirmed.

CLIFFORD B. ALLEN,
Amicus Curiae.

# OPINION



# SUPREME COURT OF THE UNITED STATES.

No. 577.—OCTOBER TERM, 1926.

St. Louis and San Francisco Railroad
Company et al., Petitioners,

vs.

E. B. Spiller et al.

On Certiorari to the United
States Circuit Court of
Appeals for the Eighth
Circuit.

[May 16, 1927.]

Mr. Justice Brandels delivered the opinion of the Court.

In 1913, the federal court for eastern Missouri appointed receivers for the St. Louis and San Francisco Railroad. In 1916. the system was sold on foreclosure, was purchased for the Reorganization Committee and was conveyed to the St. Louis-San Francisco Railway Company which has operated it since. In 1920, Spiller recovered in the federal court for western Missouri a judgment against the old company in personam for \$30,212.31 and for counsel fees taxed as costs pursuant to § 16 of the Act to Regulate Commerce. Thereupon, he filed in the receivership suit, upon leave granted, an intervening petition praying that the judgment be satisfied out of the property so acquired by the new company. The Master recommended that the prayers of the petition be granted. The District Court denied Spiller any relief and dismissed the intervening petition without costs to either party. 288 Fed. 612. The Court of Appeals reversed the decree; remanded the case to the lower court with directions to enter a decree for Spiller in the amount of the judgment with interest but without counsel fees; declared that the judgment was prior in lien and superior in equity to the mortgages of the old company; and directed that it be enforced against the property conveyed to the new

<sup>&</sup>lt;sup>1</sup>The intervening petition and the decree cover also another judgment for \$3,652.97 in favor of Spiller and others.

<sup>&</sup>lt;sup>2</sup>There were in fact four suits; two brought by unsecured creditors and two by the trustees of mortgages under which the foreclosure was had. All the suits were consolidated in May, 1914.

company. 14 F. (2d) 284. This Court granted the petition of the two companies for a writ of certiorari. 272 U.S. —.

The judgment which Spiller seeks to enforce through the intervening petition was entered by the trial court in 1916, after the foreclosure sale and before confirmation thereof; was reversed by the Court of Appeals in 1918; and was reinstated by this Court in 1920. Spiller v. Atchison, Topeka & Santa Fe Ry. Co., 253 U. S. 117. It is for overcharges collected by the old company, in 1906, 1907 and 1908 under a freight tariff which had been increased in 1903 and which was held by the Interstate Commerce Commission to be unreasonable in 1905, and again in 1908. Cattle Raisers' Association v. Missouri, Kansas & Texas R. R. Co. et al., 11 I. C. C. 296; 13 I. C. C. 418. The action in which the judgment was recovered was begun in 1914, after the appointment of the receivers. The reparation order on which the action was based was entered also after their appointment; but the petition for reparation was filed prior thereto.

The validity of the judgment as against the old company is not challenged in this proceeding. The question here is whether Spiller is entitled to have it satisfied out of the property of the new company. The railroads contend that in nature the claim is one not entitled to preferential payment; and that, in any event, Spiller is barred by laches or otherwise from obtaining any relief in this The Court of Appeals held that the old company became liable as trustee ex maleficio for overcharges and that this liability is enforceable, as upon a constructive trust, against the property acquired by the new company on foreclosure. It held further that Spiller was not barred by laches or otherwise, because of the provision of the foreclosure decree, by which the purchaser became bound to pay, as a part of the purchase price, any unpaid claims of creditors of the old company which should be adjudged superior in equity to its mortgages, the court reserving to itself jurisdiction to determine the amount and validity of any such claim.

First. The contention that the judgment constitutes a lien or equity upon the property of the new company, as upon a constructive trust, rests upon the following argument. The freight rates being unreasonable were unlawful. The shipper was obliged to pay the charges exacted, although they were unlawful, because they were the published rates. As the shipper was obliged to pay the un-

lawful charges the payment was made under duress. One may be held as trustee ex maleficio of funds obtained by duress as well as of those procured by fraud. The old company by collecting the unlawful charges became trustee ex maleficio of the funds collected. These can be traced and may be followed. They passed to the receivers who took the funds with notice and without paying value. Upon the foreclosure they passed to the new company. It also took them with notice and is subject to the trust, either because the shipper's equitable lien or interest was not cut off by the foreclosure sale, to one with notice, in a suit to which the shipper was not a party, or because the new company agreed to pay pursuant to the foreclosure decree claims prior in lien and superior in equity to the mortgages of the old company.

We need not consider whether, in the absence of legislation, charges illegally exacted by a carrier may be recovered under the doctrine of a constructive trust; or whether the alleged equitable remedy is applicable to overcharges subject to the Interstate Commerce Act, which provides a different remedy:3 or whether the equitable remedy, if any, has been lost by proceeding to judgment at law. For, even if the overcharges when collected, were subject to a constructive trust in favor of the shipper, the contention that the money exacted by the old company in 1906, 1907 and 1908 can be traced into the hands of the receivers is unfounded. money was not ear-marked. It was mingled when collected with other money received from operation. And no special account was kept of it. The latest exaction occurred five years before the appointment of the receivers. The assertion that the money collected can be traced into the receiver's hands is confessedly without any support except the stipulated fact that, throughout the ten years which elapsed between the earliest exaction and the transfer of the properties to the new company, the old one and the receivers had, at all times, in the several banks on which checks for current expenses were drawn, a working balance, in the aggregate, largely in excess of Spiller's claim. Such a showing fails to bring the present case within the rule by which, when trust funds are mingled

<sup>&</sup>lt;sup>3</sup>See §§ 8, 16(1), and 16(2) of the Interstate Commerce Act as it stood at the time of the overcharges in question, Act of Feb. 4, 1887, c. 104, 24 Stat. 379, 382, 384, as amended by the Act of June 29, 1906, c. 3591, 34 Stat. 584, 590. See also Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426.

with others, the cestui may assert an equitable lien upon the mingled mass to the extent of his contribution thereto. American Can Co. v. Williams, 178 Fed. 420, 423; In re A. D. Matthews' Sons, 238 Fed. 785, 787. An illegal exaction does not impress an indelible trust upon all funds which the wrongdoer and his successors may thereafter have on deposit in their banks. For aught that appears, all the money illegally exacted may have been spent for current operating expenses.

Second. Spiller contends that he was entitled to preferential payment of his judgment for the excess charges, out of operating income accruing during the receivership, on the doctrine of Fosdick v. Schall, 99 U. S. 235, 251-255. See New York Dock Co. v. S. S. "Poznan", No. 229, decided April 11, 1927, pp. 3-4. It is argued that the test of this equity is the nature of the claim; that a liability for excess charges unlawfully exacted by the carrier before the receivership is an expense of operation like a debt incurred for labor. supplies, equipment or improvements; and that, as such, it is entitled to priority over bondholders. We need not determine whether the noncontractual claim here in suit is in its nature within the class of debts entitled to preferential payment under the doctrine of Fosdick v. Schall. For, by long established practice, the doctrine has been applied only to unpaid expenses incurred within six months prior to the appointment of the receivers. See Lackawanna Coal Co. v. Trust Co., 176 U. S. 298, 316. Compare Gregg v. Metropolitan Trust Co., 197 U. S. 183. The cases in which this time limit was not observed, are few in number and exceptional in character. See Burnham v. Bowen, 111 U. S. 776, 780-783; Union Trust Co. v. Morrison, 125 U. S. 591. In no case which has come to our attention has the doctrine been applied to liabilities which, like those here in question, accrued many years before the receivership began.

Third. Preferential payment is urged also on the ground of public policy. The argument is that the carrier is invested through its franchise with a part of the sovereign power; that in the exercise of the power conferred the old company exacted illegal rates

<sup>4</sup>Compare National Bank v. Insurance Co., 104 U. S. 54, 63-68; Schuyler v. Littlefield, 232 U. S. 707, 710; United States v. Leary, 245 U. S. 1, 5; Cunningham v. Brown, 265 U. S. 1, 11-13; Southern Cotton Oil Co. v. Elliote, 218 Fed. 567, 570-571; In re A. Bolognesi & Co., 254 Fed. 770; Knatchbull v. Hallett, 13 Ch. Div. 696.

which the shipper was obliged by law to pay; that when the old company's property passed into the hands of the court it was augmented by the illegal exactions; that it became the court's duty to make restitution; and that, having failed to do so while the property was in its hands, the court may require payment from the new company. It may be assumed that this claim for overcharges is meritorious in character; but the fact that it arose many years before the appointment of the receivers is conclusive against including it among those entitled to preferential payment.

Fourth. In order to establish as against the new company either the alleged equity or a right to preferential payment, it was moreover assumed to be necessary that the claim should be one of those which the purchaser, under the decree of foreclosure, agreed to pay, as part of the purchase price. The decree provided that the purchaser would not be required to pay any "claim or demand which has not been presented in this cause in accordance with the orders, heretofore made requiring presentation thereof" unless it be "a claim or demand which may arise after the entry of this decree." An interlocutory decree had ordered that all claims be presented before February 1, 1916 or be barred of enforcement against the property in the hands of the receivers or the proceeds thereof. Due notice of the order had been given by publication. Spiller did not file his claim within the time limited. He contends that the time limit has no application to his claim, because it arose after entry of the decree.

The argument is that while the claim accrued in 1914, when the reparation order was entered, or earlier when the overcharges were illegally collected, it did not "arise" until 1920 when this Court, reversing the Court of Appeals, reinstated the judgment sought to be enforced by the intervening petition; that, in this connection, the term "arise" must have been used by the District Court in a sense different from "accrues". For, knowing through its receivers, that their counsel were, at the time of the entry of the decree of foreclosure, hotly contesting Spiller's claim, and that he was asserting that it was superior in equity to the mortgages to be foreclosed, and knowing also that the claim had not been filed in the receivership suit, the court must have intended that if Spiller ultimately prevailed, his claim should be satisfied by the new company. Unless so construed, the provision for claims which may "arise" after the decree would be practically inoperative. The

argument is not persuasive. We are of opinion that the term "arise" was used in the decree as the equivalent of "accrue"; that Spiller's claim arose at least as early as 1914, when the reparation order was entered, not when the judgment was recovered; and that the new company did not assume to pay it. See Phillips v. Grand Trunk Ry. Co., 236 U. S. 662, 666. Moreover, while the barring clause of the final decree excepted claims arising after entry thereof, the clause stating the liability of the purchaser included only claims against the old company which should be adjudged prior in equity to the old company's mortgages. We have already decided that the claims in question are not of such a character.

Fifth. Spiller contends also that he is entitled, under the doe. trine of Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482, to require the new company to satisfy in full his judgment against the old. The argument is that, under the reorganization plan, stockholders of the old company were allowed to participate in the new, but that he a creditor, was not offered an opportunity to do so. There is no evidence in the record which supports the assertion that Spiller was not afforded an opportunity of participating in the reorganization. The contrary appears. The order confirming the foreclosure recites that "a fair and timely offer of cash . . or participation" was made to those unsecured creditors who had filed claims. Spiller did not file his claim. The fact that he did not have actual knowledge of the order limiting the time for filing claims is not material in this connection. Notice by publication was legally sufficient. The mere fact that his claim was contested did not exclude him from the scope of the order. He might have filed it although he was litigating elsewhere. He cannot bring himself within the doctrine of the Boud case by showing that no offer was made to him personally. For aught that appears an offer would have been made, or his rights otherwise preserved, if he had filed his claim. There is no occasion to consider whether a petition for intervention filed in the receivership proceedings four years after confirmation of the foreclosure sale is an appropriate method of enforcing the claim on this theory.

Sixth. While the Court of Appeals erred in granting the specific relief prayed in the petition for intervention, it does not follow that Spiller must be denied all remedy. He was guilty of a serious inadvertence in not filing his claim in the receivership suit within the time limited by the interlocutory order. But it is clear that

he has not been guilty of laches. Southern Pacific Co. v. Bogert, 250 U. S. 483, 488-490. And it does not appear that his inadvertence misled in any way the court, the receivers, the Reorganization Committee or the new company. He had prosecuted his claim with vigor for years before the receivers were appointed. His diligence does not appear to have slackened either during the receivership or after the foreclosure sale. Throughout the whole period, the claim appears to have been resisted with equal vigor. After the old company ceased to function, counsel for the receivers conducted the defense. After the receivers ceased to function, counsel for the new company conducted the defense. It is clear that neither the receivers nor the new company considered the failure to file the claim in the receivership a bar to the relief.

Before Spiller recovered judgment in the trial court, the sale on foreclosure was had; but the hearing on the order to confirm the sale was yet to be held. At that hearing Spiller gave, before the confirmation of the sale, notice in open court, and otherwise to the old company, to the receivers, to the Reorganization Committee and to the new company, that he had recovered judgment fourteen days before. He notified them that he claimed that the purchaser would take the property subject to all his rights; and that these included a charge upon the property in the hands of the purchaser for full payment of the judgment. With knowledge of Spiller's claims, the Reorganization Committee and the new company took over the property. Later, the new company assumed the further defense to the action in which the judgment had been recovered. The issue of the securities of the new company and the distribution of its stock among stockholders in the old occurred after these notices of Spiller's claim had been given. Under such circumstances, neither the long delay, nor the failure to file claims as required by the interlocutory and final decrees, should operate to prevent the appropriate relief;5 and the District Court had jurisdiction to grant it. Compare Julian v. Central Trust Co., 193 U. S. 93; Wabash Railroad v. Adelbert College, 208 U. S. 38, 54-57.

The new company contends, that since the shipper's claim was not filed within the time limited by the interlocutory decree it was

See Williams v. Gibbes, 17 How. 239, 254-257; Park v. New York, L. E.
 W. R. R. Co., 140 Fed. 799; Employers' Assur. Corp. v. Mahogany Co.,
 F. (2d) 945. Compare Farmers' Trust Co. v. Chicago, etc. R. R. Co., 118
 Fed. 204; Western N. Y., etc. Ry. Co. v. Penn Refining Co., 137 Fed. 343.

among those declared barred by the terms of the final decree; and that by intervening he estopped himself from obtaining any relief No good reason is shown why relief may not be had as well upon an intervening petition as upon an original bill. As this may be done, he should be put, as nearly as may be consistently with the rights of others, into the position which he would have occupied had he filed his claim in the receivership proceedings in the proper time. It does not appear that it is not possible for the new company to give him the benefit now of the offer which was made by the Reorganization Committee to the other unsecured creditors of the old company; nor that such a course would be inequitable to others in interest. The ascertainment of the relevant facts and the precise form of the relief must be left to the District Court. The decree of the Circuit Court of Appeals is affirmed in so far as it reversed the decree of the District Court dismissing the intervening petition; and is reversed in so far as it directed that the judgment is a prior lien enforceable for the full amount exclusive of counsel fees against the property of the new company.

Decree affirmed in part, and reversed in part.

A true copy.

Test:

Clerk, Supreme Court, U. S.

<sup>&</sup>lt;sup>6</sup>Compare Swift v. Black Panther Gas Co., 244 Fed. 20; Commercial Electrical Supply Co. v. Curtis, 288 Fed. 657.

